Misrepresentations by Lawyers About Credentials or Experience

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MISREPRESENTATION BY LAWYERS ABOUT CREDENTIALS OR EXPERIENCE

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I. The Problem

To what extent must a lawyer disclose to a client or a potential client unfavorable facts relating to the lawyer's credentials or prior experience? Must a lawyer reveal, with respect to the area of the law in which the layperson seeks legal services, the nature and extent of the lawyer's training, prior work, or results obtained on behalf of other clients?

For example, is it necessary for a lawyer to tell a client that the lawyer: (1) failed, did poorly in, or neglected to take relevant law school courses? (2) has handled no, only one, or just a few similar cases? (3) has not performed similar work in a long time or without assistance from another lawyer? (4) lacks board certification in the relevant specialty? (5) has never handled a case involving injuries or damages as great as those in the proposed representation? (6) was unable to secure, or secured an inadequate, recovery when representing a client with a similar claim? (7) was subject to sanctions, grievances, or malpractice claims in connection with prior work? (8) was asked to leave a former law firm because of allegedly poor work habits? (9) is presently, or was previously, suspended from the practice of law? (10) was earlier disbarred, then subsequently reinstated? (11) is now, or was previously, addicted to illegal drugs? or (12) was charged with, or found guilty of, criminal conduct relating to a client or other matter? These questions are important because lawyers must continually decide what information should be provided to clients.

The issue here is not competence to undertake the proposed representation but disclosure of information relating to the client's selection of counsel or continuation of representation. With respect to the obligation of competence,

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the law is clear that a lawyer may accept a case in an area in which the lawyer has not previously practiced, provided that the attorney can rise to the level of performance expected of a reasonably prudent attorney through self-study or by associating with other lawyers with whom the client consents.[1] However, even if competence can be achieved in a timely fashion, the question remains whether the lawyer must tell the client that he presently lacks certain credentials or experience. In addition, must the lawyer provide the client with information — particularly, unfavorable information — upon which the client can judge the breadth, depth, and efficacy of the lawyer's credentials and experience?

Authorities appropriately condemn dishonesty by attorneys in the broadest terms.[2] In moving from moral principles to legal liability, however, it is important to think carefully about when it is that a lawyer's conduct misleads a client in a way that is actionable. As discussed below, whether liability will be imposed depends upon the nature of the misrepresentation, the status of the plaintiff, the theory of liability, and the presence of competing interests or special considerations.

First, there are three important types of conduct that may result in misrepresentation: (1) silence; (2) potentially misleading statements, such as half-truths and statements of opinion, including puffing; and (3) outright deception based on false statements. Tort law typically deals with these types

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1. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). The comment to Rule 1.1 provides:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Id. R. 1.1 cmt. 2. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2000) [hereinafter RESTATEMENT OF THE LAW GOVERNING LAWYERS] (stating "a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances"); *see also In re* Discipline of Laprath, 670 N.W.2d 41, 62 (S.D. 2003) (asserting that "mere length of time one is a member of the [State] Bar does not equate with superior professional skills and competence"); *cf.* RESTATEMENT (SECOND) OF TORTS § 299A cmt. d (1977) [hereinafter RESTATEMENT OF TORTS] (noting an actor may make it clear that the actor has less than the minimum skill common to the profession or trade and then is only required to exercise the skill the actor represents).

2. *See, e.g.*, Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 685 (1990) (opining that "[s]elf-interested deception of clients by lawyers should be prohibited. There is no justification for allowing lawyers to mislead their clients about their experience or expertise . . . .").

of conduct differently,[3] and arguably, the same will be true with respect to cases involving the disclosure duties of attorneys. For example, if a lawyer has handled only one similar matter for another client with moderate success, whether the lawyer has violated applicable disclosure obligations to another client may depend upon whether the lawyer (1) says nothing about prior experience (remains silent), (2) says "I have done good work in this area" (makes a potentially misleading statement), or (3) says "I have handled many of these cases" (tells an outright lie).

Second, lawyers owe clients different obligations than nonclients. Clients are entitled to what might be called "first-class treatment," which means, among other things, that the lawyer must exercise reasonable care to keep the client apprised of relevant information.[4] In some, but certainly not all, contexts, a lawyer owes a client a duty of "absolute and perfect candor."[5] The interests of nonclients and potential clients are typically accorded less protection.[6] Certain rules of tort law, however, impose on attorneys important obligations to prospective clients or third parties.[7]

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3. *See generally* RESTATEMENT OF TORTS, *supra* note 1, § 525 cmt. d (discussing opinions); *id.* § 527 (discussing ambiguous representations); *id.* § 529 (discussing half-truths); *id.* § 550 (discussing fraudulent concealment); *id.* § 551 (discussing liability for nondisclosure); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 736-40 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS] (discussing the difference between representation and nondisclosure).

4. *See* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 779 (2003) [hereinafter Johnson, *Candor*] (explaining that within the attorney/client relationship, the attorney "must place the client's interests above all others").

5. *See id.* at 792-93 (stating that the duty of "absolute and perfect candor" should be "limited to situations where the interests of attorney and client are adverse, . . . or to the few areas in which particular rules of conduct call for a high degree of disclosure . . . ." Otherwise, the attorney must simply "act reasonably in providing information to the client.").

6. *See* Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996) (stating that liability generally only extends to an attorney's clients); RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 1, § 15 (discussing the obligations of an attorney to a client and potential client); *see also* One Nat'l Bank v. Antonellis, 80 F.3d 606, 609 (1st Cir. 1996) (stating that "[i]t must be shown that the attorney should reasonably foresee that the nonclient will rely upon him for legal services").

7. *See, e.g., In re* Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 604 (S.D. Tex. 2002) (indicating that, under Texas law, an attorney may be liable to a nonclient for fraudulent misrepresentation); Schreiner v. Scoville, 410 N.W.2d 679, 681 (Iowa 1987) (indicating that an attorney may be held liable to an heir or testamentary beneficiary (nonclient) when the attorney's error causes a testamentary document to be invalid); Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978) (stating that for an attorney to be liable for legal malpractice, a third party must be an intended and direct beneficiary of the attorney's services). *But see* Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 484 (Tex. 1992) (noting that "Texas courts have been understandably reluctant to permit a malpractice action by a nonclient because of the potential interference with the duties an attorney owes to the client").

Third, disclosure obligations may be imposed under a variety of legal theories. Some theories defining attorney duties are more demanding than others. Theories offering the most useful points of reference include deceit (more commonly called "fraud"), negligent misrepresentation, lack of informed consent, and breach of fiduciary duty. However, even if a particular theory of tort liability applies, the obligations that it imposes may be subject to qualifications or exceptions based on duties owed by the attorney to other present or former clients. For example, if well-established rules of professional conduct require a lawyer to keep certain information secret, such as the amount of a settlement the lawyer secured for another client pursuant to a confidentiality agreement, other principles of law will not necessitate that the lawyer reveal that information. "[T]here is never a duty to disclose to one client what must be held confidential to protect another."[8]

Finally, in some contexts, the attorney's privacy interests or other important considerations may trump rules that would otherwise require disclosure of information about credentials or experience. For example, a lawyer presumably does not have to disclose to a client a disciplinary sanction in the nature of a private reprimand.[9] In that situation, there has already been a judicial or quasi-judicial determination that the public interest is best served by the reprimand being private, rather than public.[10] As a second example,

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8. Johnson, *Candor*, *supra* note 4, at 787-88. Note, however, that when a lawyer cannot tell one client material information about another client, there may be a conflict of interest that will subject the lawyer to ethical obligations, which, if not heeded, may result in disciplinary and legal liability. *Id.* at 787 ("In the most extreme case, ethics rules require the lawyer to decline or withdraw from proposed or existing representation, rather than breach confidentiality.").

9. *Cf.* Charles E. Lundberg, *Making Private Discipline a Public Matter*, BENCH & BAR OF MINN., Feb. 2003, at 1, *available at* http://www2.mnbar.org/benchandbar/2003/feb03/prof-resp.htm. The article states:

> Every year over 100 Minnesota lawyers receive Rule 8(d)(2) private admonitions — written findings that a disciplinary rule has been violated but that the violation is isolated and non-serious and therefore the lawyer is privately admonished. An admonition goes on the lawyer's permanent record, but normally remains strictly confidential under Rule 20. The lawyer may sometimes have to disclose the admonition "voluntarily," in the context of a legal malpractice insurance renewal application, an application for a judgeship or other public office, etc. But it will normally never become public in the sense of being in the newspaper.

Id. at 1.

10. *But see* Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 485-86 (2001) ("[L]awyer disciplinary systems should be altered to allow the greatest possible flow of information to the public. . . . Disciplinary bodies should make all client complaints a matter of public record. . . . Lawyers who have been disciplined should be required to disclose the

consider the domestic privacy interests of lawyers. Those interests ordinarily mean an attorney has no duty to disclose to a client marital difficulties that may affect the lawyer's performance.[11]

The questions mentioned at the beginning of this Article regarding the disclosure obligations of attorneys are not theoretical. Malpractice plaintiffs often allege that their attorneys lacked necessary credentials or experience.[12] It is but a short step from the malpractice allegation of incompetence to a claim that the lawyer not only lacked proper credentials or experience, but also failed to disclose or otherwise misrepresented information about those deficiencies, thereby depriving the client of the opportunity to make an informed decision in selecting counsel or choosing a course of action. Clients have made precisely those types of misrepresentation claims in recent legal malpractice cases.[13]

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discipline to any new customers."); Melvin Hirschman, *Private Discipline Comes to an End*, MD. BAR J., May/June 2003, at 58, 58 (indicating that "under [Maryland's] new disciplinary rules of procedure all reprimands are public").

11. *Cf.* Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d 777, 782 n.19 (Ga. 2000) (suggesting that there is no duty to disclose where a doctor, "the night before receiving patients, is served with divorce papers").

A lawyer who is having marital difficulties has a duty to act reasonably. In an extreme case, where the difficulties pose a serious threat to the representation, the lawyer may have a duty to disclose the risks or withdraw. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(2) (2002) (stating that "a lawyer shall not represent a client . . . if . . . the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client"). In addition, a false statement about marital status may be actionable. *See* Walter v. Stewart, 67 P.3d 1042, 1048 (Utah Ct. App. 2003) (holding that an attorney's misrepresentation to a former client, with whom the attorney had a sexual relationship, that he was not married was "material" for purposes of stating a claim for fraud action against the attorney).

12. *See, e.g.*, Lehrer v. Supkis, No. 01-00-00112-CV, 2002 WL 356394 (Tex. App. Feb. 28, 2002). A former client alleged that an attorney (Supkis) "was not qualified to represent him" because "Supkis . . . had never tried a case involving divorce, breach of fiduciary duty, fraud, and [Deceptive Trade Practices Act] claims, and he was not board certified in family law." *Id.* at *3. In upholding a jury verdict that the attorney was not negligent, the court found that the former client had failed to "state how Supkis's lack of experience in trying these types of cases constituted or contributed to an act of negligence." *Id.*

13. *See, e.g.*, Baker v. Dorfman, 239 F.3d 415 (2d Cir. 2000). In *Baker*, the trial court found that the defendant attorney "made and acknowledged" the following misrepresentations:

> 1. He opened his own practice not in 1991, as he represented to Baker, but only one month before he met Baker in 1994.
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> 2. The first jury he had selected was that which heard this case against him.
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> 3. He was not even admitted to practice law until 1992.
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> 4. At the time he gave his resume to Baker in 1994, he was not a member of the New Jersey or Massachusetts bars despite having passed the bar exam in each of those states.
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> 5. As of 1994, he had not yet represented a single health care organization as

The difference between allegations of incompetence and misrepresentation is important. Incompetence ordinarily will not support an action for anything more than lack of care, which includes actions for negligence (lack of ordinary care) or recklessness (extreme lack of care). Misrepresentation, in contrast, may support a claim for intentional fraud,[14] and will thus carry with it advantages, such as the possibility of punitive damages,[15] the irrelevance of

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their attorney.

6. He had not created the L.L.M. in Health Care Law at NYU, but instead had met with the dean and designed his own individual course of study.

7. He still has not completed his studies to receive the L.L.M. degree from NYU.

8. He had not actually taught a course at NYU, but was a tutor.

9. He had not done any work at all for private companies concerning the Americans with Disabilities Act.

10. The public company for which he had done per diem work was the Department of Juvenile Justice.

11. He had not done any work in the area of labor relations.

12. The particularly difficult or important cases for which he had served as special litigation counsel were landlord-tenant cases that he did on a per diem basis.

13. All of the other cases referenced in his resume were cases in which he acted on a per diem basis hired by counsel.

Id. at 424 (internal quotations and alterations omitted); *see also* Griffin v. Fowler, 579 S.E.2d 848 (Ga. Ct. App. 2003) (holding that a former client failed to prove that an attorney misrepresented his experience and knowledge in estate planning matters); Miller v. Kennedy & Minshew, P.C., 142 S.W.3d 325 (Tex. App. 2003). In *Miller*, the plaintiffs claimed that an attorney, by way of misrepresentations about his expertise, had induced them to engage the firm to represent their interests in their dispute with the other owners of a small telecommunications company. *Miller*, 142 S.W.3d at 331, 343. The alleged misrepresentations concerning expertise may have played a role in the findings against the attorney and the law firm, but the complexity of the facts, arguments, and appellate opinion make it impossible to say precisely what role, if any, the alleged misrepresentations had in the decision of the case.

In addition, there have been several recent parallel decisions involving the credentials or experience of other professionals. *See, e.g.*, Howard v. Univ. of Med. & Dentistry, 800 A.2d 73 (N.J. 2002) (holding that a patient could sue a neurosurgeon on a lack-of-informed-consent theory, but not for fraud, with respect to alleged misrepresentation of experience and credentials); Commodity Futures Trading Comm'n v. Commonwealth Fin. Group, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994) (stating that, under the antifraud provisions of the Commodity Exchange Act, "[m]isrepresentations regarding the trading record and experience of a firm or broker are fraudulent because past success and experience are material factors which a reasonable investor would consider when deciding to invest in commodity options").

14. *See infra* Part II.A (discussing actions for fraud).

15. *See Baker*, 239 F.3d at 418 (awarding punitive damages against an attorney who committed resume fraud); *Griffin*, 579 S.E.2d at 853 (stating that if the plaintiff had proven that an attorney had fraudulently misrepresented his expertise or experience, the client would have been entitled to punitive damages as part of his legal malpractice claim); *cf.* McKinnon v. Tibbetts, 440 A.2d 1028, 1030 (Me. 1982) (holding that although the plaintiff amended a legal

the contributory negligence defense,[16] the nondischargeability of a judgment in bankruptcy,[17] and, in some states, a longer statute of limitations[18] and joint and several liability.[19] Also, because misrepresentation often involves a breach of the duty of loyalty, it may constitute the type of fiduciary duty claim that will support forfeiture of attorney fees, even if the client has suffered no actual damages.[20] This is important because malpractice plaintiffs

malpractice complaint sounding in negligence to allege fraud, the evidence failed to show that the attorney acted with malice or wanton and reckless disregard of plaintiff's rights, and therefore a punitive damages award could not be sustained, even though fraud was proved).

16. Fraud requires proof of intentional or reckless misrepresentation. *See infra* Part II.D.1 (discussing the requirement of scienter). If the fraud was intentionally, rather than recklessly committed, carelessness on the part of the plaintiff will ordinarily not be a defense. *See* UNIF. COMPARATIVE FAULT ACT § 1(b) (1977) (defining "fault" as "acts or omissions that are in any measure negligent or reckless" and by implication precluding a comparative-fault defense in cases where the defendant acts intentionally).

17. *See* 11 U.S.C. § 523(a)(2)(A) (2000) (stating that bankruptcy will not discharge a debt for "money, property, [or] services . . . obtained by . . . actual fraud").

18. For example, in New York, actions based upon fraud must be commenced within six years of "the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it." N.Y. C.P.L.R. 213(8) (McKinney 2003 & Supp. 2004). Other claims are typically subject to shorter statutes of limitations. *See id.* 214(6) (stating that a three-year statute of limitations applies to "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort").

Courts sometimes, however, construe statutes of limitations in ways that negate the advantages of alleging fraud. *See, e.g.*, Paulos v. Johnson, 597 N.W.2d 316, 320 (Minn. Ct. App. 1999) (holding that a six-year statute of limitations for fraud actions did not apply to allegations that a physician fraudulently solicited plaintiff's business because allegations were "supported by evidence directly connected to . . . [the physician's] examination, diagnosis, treatment and care" of the plaintiff, and were therefore subject to the shorter statute of limitations applicable to medical malpractice actions).

19. *See, e.g.*, MINN. STAT. ANN. § 604.02(1)(3) (West 2000 & Supp. 2004) (providing that "a person who commits an intentional tort" is "jointly and severally liable for the whole award").

20. *See* Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (holding that attorney's breach of duty of loyalty to client may justify forfeiture of attorney's fee without proof of actual damages); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 1, § 37 (providing that "[a] lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter," depending on "the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies"); Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 625-35 (2002) (discussing fee forfeiture in general).

Incompetence ordinarily is only a breach of the duty of care, not a form of disloyalty. Therefore, in states that condition forfeiture on disloyalty, incompetence usually will not suffice as the predicate for forfeiture. *See Burrow*, 997 S.W.2d at 238 (stating that "the central purpose

increasingly allege that attorneys' breaches of duty warrant both an award of damages *and* forfeiture of attorney fees.

What follows is a brief guide to the feasibility, advantages, and limitations of alternative theories bearing upon the question of when an attorney is subject to tort liability for misrepresenting credentials or experience. Part II discusses claims based on fraud, including liability for failure to disclose facts basic to a transaction, facts not reasonably discoverable, or facts within the scope of a fiduciary relationship. Part II also addresses liability under fraud for potentially misleading statements that fall within the categories of half-truth, opinion, puffing, and state of mind. In addition, this part considers liability based on implicit statements of fact and outright lies and examines other factors bearing upon the viability of fraud claims, such as the requirements of scienter, intent to induce reliance, and causation of damage. Furthermore, Part II addresses special considerations relating to claims by nonclients and the privacy interests of attorneys.

Part III discusses claims relating to misrepresentation of credentials or experience that are rooted in negligence, including actions based on negligent misrepresentation and lack of informed consent. Finally, Part IV summarizes the complex state of the law relating to attorney liability for misrepresentation of credentials or experience.

II. Fraud

A. Silence

It has long been said that "silence is golden." This rule applies in the legal arena, as in other contexts. In general, there is no duty to disclose information merely because another person would find that information useful, interesting, or beneficial.[21] In the field of torts, the no-duty-to-speak rule is widely applied,[22] particularly in fraud actions.[23] However, the general rule on silence

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of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty").

21. *See* RICHARD A. EPSTEIN, TORTS 553 (1999) ("[N]ondisclosures are but instances of nonactionable nonfeasance. Just as D is under no obligation to rescue a stranger from peril, so too D need not disclose to P any information that might help P to make a firm decision.").

22. *See, e.g.*, Doe v. Associated Press, 331 F.3d 417, 421 (4th Cir. 2003) (holding that reporter had no duty to disclose his intent to disobey judge's instruction to the media not to disclose the identity of a sexual assault victim, who testified at trial on condition of anonymity); Urman v. S. Boston Sav. Bank, 674 N.E.2d 1078, 1080 (Mass. 1997) (finding that a bank selling a condominium in a neighborhood that had received a "lot of adverse publicity" had no duty to disclose that a toxic waste problem had been recently cleaned up at a nearby school); Levine v. Kramer Group, 807 A.2d 264, 270 (N.J. Super. Ct. App. Div. 2002) (holding that builder selling new home had no duty to disclose that a hostile neighbor had raised threatening

is subject to several important exceptions. At least three of these exceptions are relevant to whether an attorney has a duty to disclose unfavorable information about the attorney's credentials or experience.[24] The first exception concerns facts "basic to the transaction";[25] the second exception concerns facts "not reasonably discoverable";[26] and the third exception concerns facts "within the scope of a fiduciary relationship."[27] In all situations, attorneys' disclosure obligations are limited by a variety of considerations, including scope of representation, materiality, client knowledge, competing obligations to others, client consent, and threatened harm to the client or others.[28] Regardless of the theory for imposing a duty of disclosure, these considerations may limit the obligations of attorneys.

1. Facts Basic to the Transaction

According to the *Restatement (Second) of Torts*, there is a duty to disclose facts "basic to the transaction," the nondisclosure of which is tantamount to deliberate victimization.[29] In discussing this exception, the *Restatement*

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and abusive objections to the house as an "abominable monolith").

23. Courts differ somewhat in their articulation of the elements of fraud. *Compare* Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 586 S.E.2d 507, 512 (N.C. Ct. App. 2003) (naming the elements of fraud as "(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party"), *with* Robbins v. Capozzi, 100 S.W.3d 18, 23 (Tex. App. 2002) (holding that claimant must prove "(1) a material representation was made, (2) the representation was false, (3) when the representation was made, the speaker knew it was false or made the statement recklessly without any knowledge of truth and as a positive assertion, (4) the representation was made with the intention that it be acted upon by the other party, (5) that party acted in reliance upon the representation, and (6) that party suffered injury").

24. There are other exceptions that may create a duty to speak in cases involving attorneys and clients. For example, there is a duty to update previous statements when new information makes them untrue or misleading. *See* McMahan v. Greenwood, 108 S.W.3d 467, 494 (Tex. App. 2003) (stating that even if an attorney was representing only persons other than the plaintiff when he allegedly made certain statements, or when he later allegedly failed to disclose the falsity of the statements during negotiations, he was still under a duty to disclose the entire truth and to correct any misimpressions caused by his earlier statements); 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 7.14, at 476 (2d ed. 1986).

25. *See infra* Part II.A.1.

26. *See infra* Part II.A.2.

27. *See infra* Part II.A.3.

28. *See* Johnson, *Candor*, *supra* note 4, at 778-92.

29. The provision states in relevant part:

> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
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> . . . .
>
> (e) facts basic to the transaction, if he knows that the other is about to enter

commentary explains:

> There are situations in which the defendant not only knows that his bargaining adversary is acting under a mistake basic to the transaction, but also knows that the adversary, by reason of the relation between them, the customs of the trade or other objective circumstances, is reasonably relying upon a disclosure of the unrevealed fact if it exists. In this type of case good faith and fair dealing may require a disclosure.
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> It is extremely difficult to be specific as to the factors that give rise to this known, and reasonable, expectation of disclosure. In general, the cases in which the rule . . . has been applied have been those in which the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware.[30]

The facts-basic-to-the-transaction exception is narrow,[31] and only in the rarest of cases involving an attorney and client or prospective client will the standard be met. However, in extreme situations, such as where a lawyer fails to disclose that he is presently suspended from the practice of law,[32] under

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> into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Comment *l* adds:

> Thus a seller who knows that his cattle are infected with tick fever . . . is not free to unload them on the buyer and take his money, when he knows that the buyer is unaware of the fact [and] could not easily discover it.

RESTATEMENT OF TORTS, *supra* note 1, § 551 & cmt *l*.

30. *Id.*

31. *Compare* Stambovsky v. Ackley, 572 N.Y.S.2d 672, 674 (N.Y. App. Div. 1991) (allowing rescission where vendor of a house, who had informed the media about the existence of poltergeists, failed to disclose the dwelling's reputation as a haunted house to a nonlocal buyer because "[t]he impact of the reputation thus created goes to the very essence of the bargain between the parties, greatly impairing both the value of the property and its potential for resale"), *with* Lithuanian Commerce Corp. v. Sara Lee Hosiery, 179 F.R.D. 450, 478 (D. N.J. 1998) (holding that manufacturer's failure to disclose to a distributor negative opinions from a marketing survey was not "so shocking to the ethical sense of the community, [or] so extreme and unfair, as to amount to a form of swindling" that would support an action for fraud).

32. *See, e.g.*, Boston Univ. v. Univ. of Med. & Dentistry of N.J., 820 A.2d 1230, 1230-33 (N.J. 2003) (holding that New Jersey attorneys who are not in good standing in the state may not rely on their good standing in other states, but must disclose their status in New Jersey, when seeking to appear *pro hac vice*); Attorney Grievance Comm'n of Md. v. Brennan, 714

indictment, or addicted to illegal drugs,[33] nondisclosure by an attorney may involve facts so basic to the transaction as to impose a duty to speak under the terms of the *Restatement* rule.

2. Facts Not Reasonably Discoverable

Many tort cases hold that persons have a duty to disclose material facts that are not reasonably discoverable.[34] This is true even if the facts are not so important as to qualify as basic to the transaction.[35] The facts need only be material and not discoverable through the exercise of reasonable care.

Materiality simply means that the matter is such that it would be given weight in the plaintiff's decision-making process.[36] However, the matter need

A.2d 157, 162-63 (Md. 1997) (holding that a licensed attorney violated the ethics rules by assisting a suspended attorney who failed to disclose his suspension to clients); *In re* Devers, 974 P.2d 191, 196 (Or. 1999) (holding that an attorney's failure to disclose his suspension to opposing counsel violated ethical rules); *In re* Whipple, 886 P.2d 7, 13 (Or. 1994) (holding that an attorney's intentional failure to disclose his suspension when communicating with clients about a probate matter was a misrepresentation of a material fact for purposes of the ethics rules). *But see* United States v. Maria-Martinez, 143 F.3d 914, 916 (5th Cir. 1998) (holding that representing a defendant after being barred from practice does not necessarily compel a finding of ineffective assistance of counsel).

33. *But see* Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d 777, 778 (Ga. 2000) (holding that a physician had no duty under either common law or the state informed consent statute to disclose his drug use); Kaskie v. Wright, 589 A.2d 213, 215 (Pa. Super. Ct. 1991) (holding that failure to inform parents that their child's surgeon was an alcoholic and unlicensed did not constitute fraudulent concealment that would estop the defendants from asserting a statute of limitations defense); *see also* Hidding v. Williams, 578 So. 2d 1192 (La. Ct. App. 1991) (holding that a physician's failure to inform patients of his chronic alcohol abuse violated informed consent requirements).

34. *See, e.g.*, Busch Oil Co. v. Amoco Oil Co., No. 5:94CV175, 1996 WL 33143114 (W.D. Mich. Feb. 20, 1996); Timm v. Clement, 574 N.W.2d 368 (Iowa Ct. App. 1997); Holcomb v. Zinke, 365 N.W.2d 507 (N.D. 1985); Quashnock v. Frost, 445 A.2d 121 (Pa. 1982); Mitchell v. Christensen, 31 P.3d 572 (Utah 2001).

35. *See supra* Part II.A.1. The rule regarding facts "basic to the transaction" is a narrower concept than that of materiality. HARPER ET AL., *supra* note 24, § 7.14, at 476.

36. *See* RESTATEMENT OF TORTS, *supra* note 1, § 538 (providing that a matter is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action" or "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it"); *see also* Spector v. Mermelstein, 361 F. Supp. 30, 40 (S.D.N.Y. 1972), *modified on other grounds*, 485 F.2d 474 (2d Cir. 1973) (defining "material facts" as those "which, if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course of conduct"); Robbins v. Capozzi, 100 S.W.3d 18, 24 (Tex. App. 2002) (defining as "material" information that "a reasonable person would attach importance to and would be induced to act on . . . in determining his choice of actions in the transaction in question"); Lerman, *supra* note 2, at 686 (stating that while the materiality standard often requires disclosure of additional information to clients, "the

not be the sole or predominant factor in the plaintiff's decision.[37] In many cases, materiality is a question of fact for the jury; in others, it is a question of law for the court.[38] Whether a lawyer, twenty years ago, earned a low grade in a law school course dealing with the subject matter of the representation may be immaterial as a matter of law. Whether a newly minted lawyer with no other relevant experience recently failed the pertinent law school course might raise a fact question as to materiality.[39]

The exception to the general rule of nondisclosure for facts "not reasonably discoverable" may be justified on public policy grounds. Ordinarily there is no duty to speak because a rule countenancing nondisclosure creates an incentive for persons to actively protect their own interests. Individuals cannot stand idly by waiting for others to inform them of everything they need to know. Rather, under the general rule, the individual bears the risk of loss: one who fails to gather and properly evaluate relevant facts before making a decision risks the consequences of making a bad choice. The person who neglects to act diligently loses. Thus, "[t]he individualism of the common law requires each person to live, or die, by his own wits."[40] The general rule permitting nondisclosure furthers the law's interest in discouraging the waste of talent and resources.[41]

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materiality test is not overinclusive; it exempts lawyers from having to disclose a great deal of nonessential information").

37. Some scholars suggest that the materiality standard requires a great deal in the way of disclosure:

> The question is whether the information might cause a reasonable client to alter her conduct.
>
> This "materiality" standard of disclosure appears to require additional disclosures in most of the categories of deception. . . . If the lawyer discloses her lack of experience in the area of law in which a client needs service, . . . the client might choose to retain another lawyer.

Lerman, *supra* note 2, at 686.

38. *Cf.* Scott v. Bradford, 606 P.2d 554, 557-58 (Okla. 1979) (holding in a medical malpractice case involving the informed consent doctrine that "[t]here is no bright line separating the material from the immaterial; it is a question of fact. A risk is material if it would be likely to affect patient's decision. When non-disclosure of a particular risk is open to debate, the issue is for the finder of facts.").

39. *See generally* Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283 (1992) (discussing the ways in which consumers measure "quality"). With respect to attorney credentials and experience, the article discusses client preferences relating to matters such as what law school an attorney attended, whether the attorney served on law review, the attorney's number of years in practice, and the attorney's win-loss record. *Id.* at 288-89.

40. EPSTEIN, *supra* note 21, at 553.

41. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 9 (3d ed. 2005) ("[T]ort law should encourage individuals to employ available resources to protect their own interests, rather than depend upon others to save them from harm. Many would argue that this

The exception concerning facts not reasonably discoverable recognizes the limits of the general rule that ordinarily permits nondisclosure. If facts are not discoverable, it is futile to place the burden of discovery on the plaintiff. The plaintiff will simply be relegated to making a potentially bad decision without access to material information.[42]

Moreover, extending the exception to cases where facts, though discoverable through great efforts, are not *reasonably* discoverable, avoids forcing laypersons to hire numerous experts to assist them in their decisions.[43] Consequently, one court stated:

> Where one party to a contract has . . . knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence . . . he is under a real obligation to speak, and his silence constitutes fraud.[44]

Many of the cases relating to this exception have involved the sale or lease of real property.[45] There is no apparent reason, however, why courts should limit the rule to real estate.[46] In terms of importance, engaging counsel to handle a legal matter may rank as high as, if not higher than, the transfer of an interest

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policy has been on the wane in recent years. . . . Yet, the continued vitality of the anti-waste or self-protection principle can be seen in various areas of the law. . . . There is a continuous struggle to define how much one must do for oneself, and how much one can expect from others.").

42. *See* Stambovsky v. Ackley, 572 N.Y.S.2d 672, 676 (N.Y. App. Div. 1991) ("Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity. Any other outcome places upon the buyer not merely the obligation to exercise care in his purchase but rather to be omniscient with respect to any fact which may affect the bargain. No practical purpose is served by imposing such a burden upon a purchaser. To the contrary, it encourages predatory business practice and offends the principle that equity will suffer no wrong to be without a remedy.").

43. *See, e.g.*, Mitchell v. Christensen, 31 P.3d 572, 575 (Utah 2001).

44. Wolf v. Brungardt, 524 P.2d 726, 734 (Kan. 1974).

45. *See, e.g.*, Robbins v. Capozzi, 100 S.W.3d 18, 24 (Tex. App. 2002) (holding that the vendor of a condominium did not have a duty to disclose problems that the vendor's daughter had encountered when attempting to park her car in the garage because the purchaser could have discovered, by attempting to park there herself, that her vehicle was too large for the allotted space).

46. A related rule — the "peculiar knowledge" doctrine — has been held to apply in other situations. "The 'peculiar knowledge' doctrine relates to the reasonableness of claims of reliance, finding its theoretical basis in the premise that when matters are peculiarly within the defendant's knowledge, plaintiff may rely without prosecuting an investigation, as he has no independent means of ascertaining the truth." Unicredito Italiano SPA v. J.P. Morgan Chase Bank, 288 F. Supp. 2d 485, 499 (S.D.N.Y. 2003) (internal quotations and alterations omitted).

in land. If persons selling or leasing property must disclose important facts that are not reasonably discoverable, attorneys should be unable to sell legal services without disclosing material facts that are not reasonably discoverable.

Consider how the exception for facts not reasonably discoverable might be applied to the context of lawyers and clients. Does a fact qualify as "not reasonably discoverable" if a reasonable client would not think to ask about it? In the real estate context, one court determined that "the proper standard is whether the defect would be apparent to ordinary prudent persons with like experience, not to persons with specialized knowledge."[47] One may reasonably argue that the same standard should apply to matters relating to legal representation.

Presumably, if an undisclosed matter relating to an attorney's credentials or experience obviously is connected to the subject matter of the representation, that matter should qualify as reasonably discoverable through inquiry, and disclosure should not be required. For example, a client can always ask, "Have you ever handled this kind of case before?" This type of logical question involves information that is reasonably discoverable. There will, of course, be difficult cases relating to whether information about credentials or experience should be disclosed. For example, has professional malpractice become such a part of public consciousness that a client is obliged to ask a lawyer "have you been sued for malpractice?" Or is malpractice still so uncommon that the reasonable prudent client would not think or have the courage to inquire? There is no easy answer to these questions.[48]

Most clients do not ask — and, indeed, do not think to ask — whether an attorney has ever been disbarred, reprimanded, or suspended from practice. Yet, such information about a lawyer's disciplinary history is often easily discoverable. In Texas, for example, anyone can go to the State Bar website for information about any of the more than 70,000 Texas attorneys,[49] including public disciplinary sanctions in Texas and other states.[50] Similarly, the Internet

47. *Mitchell*, 31 P.3d at 575.

48. In other contexts, courts have sometimes been reluctant to hold that the risk of being sued for malpractice was foreseeable. *See* Westport Ins. Corp. v. Lilley, 292 F. Supp. 2d 165, 172 (D. Me. 2003) (holding that a future malpractice claim against an insured law firm was not foreseeable at the time of an inconclusive and confusing jury verdict and therefore the policy's prior-knowledge exclusion was inapplicable).

49. *See* TexasBar.com, *at* http://www.texasbar.com (last visited Jan. 18, 2005).

50. Some persons doubt the usefulness of this approach. While this article was being written, a well known law professor wrote a message to the listserv for the Association of Professional Responsibility Lawyers with regard to disclosure of malpractice insurance coverage, which stated:

> If the idea is to get the information into the hands of potential clients (for whatever they decide it's worth), then having the information available on a Supreme Court

provides an increasing amount of information about persons who commit criminal conduct.[51] It can be argued that such information, if it is free or available at a nominal cost, is reasonably discoverable, and therefore the exception for facts not reasonably discoverable should not impose a duty to speak.

Other types of information are harder to obtain. For example, it may be difficult for a client to determine whether an attorney has been subject to court-imposed sanctions that are not readily discoverable through computer-based technology, such as sanctions imposed by a trial court that did not result in a reported decision. The law should not require clients to take burdensome steps to learn unusual information about an attorney that materially bears upon the representation.[52] There is, however, value to reading narrowly the exception for facts not reasonably discoverable. Clients should be encouraged to ask good questions of their attorneys and gather information to protect their own interests. Presently, too few cases exist dealing with lawyer-client disclosure issues to be able to predict with confidence the scope of the exception for facts that are not reasonably discoverable.

3. Facts Within the Scope of a Fiduciary Relationship

A fiduciary has a duty to disclose relevant information to a beneficiary because the fiduciary relationship of trust and confidence imposes a duty to speak.[53] Attorney-client relationships are fiduciary as a matter of law.[54]

> website seems like a good way of *hiding* it, not making it readily accessible. (What is the budget going to be for publicizing this web address? What percentage of consumers who *need* this information are computer-literate?)

E-mail from W. William Hodes, Professor Emeritus, Indiana University School of Law, Indianapolis, to listserv of the Association of Professional Responsibility Lawyers (Aug. 10, 2004) (on file with the authors) (used with permission of Professor Hodes).

51. *See, e.g.*, Net Detective, *at* http://www.btinternet.com/~chris.heaton/detective/criminal-record-check.htm (last visited Oct. 3, 2004) (offering searches on "criminal and prison records," "marriage, property and adoption records," "law suits, court orders and alimony," inter alia, at a cost of $29.00 for three years of unlimited searches). *But see* Lynn Peterson, *Navigating the Maze of Criminal Records Retrieval — Updated*, *at* http://records.4mg.com/criminal.htm (last visited Oct. 3, 2004) (stating that "[t]here is no such thing as a national criminal records check"); Internet for Lawyers — Criminal Records, *at* http://www.netforlawyers.com/article_public_records_03.htm (last visited Oct. 3, 2004) (explaining what records are available).

52. *Cf.* Queen v. Lambert, 577 S.E.2d 72, 74 (Ga. Ct. App. 2003) (opining that the existence of "a confidential relationship imposes a greater duty on the parties to reveal what should be revealed and a lessened duty to discover independently what could have been discovered through the exercise of ordinary care").

53. *See* EPSTEIN, *supra* note 21, at 553.

54. *See* Keywell Corp. v. Piper & Marbury, L.L.P., No. 96-CV-0660E(SC), 1999 WL 66700, at *4 (W.D.N.Y. Feb. 11, 1999).

Accordingly, it is reasonable to ask whether an attorney's nondisclosure of unfavorable information about his credentials or experience will support an action for fraud because of the fiduciary nature of the relationship, which requires a lawyer to speak. Indeed, of the three main theories for imposing a duty to speak — (1) facts basic to the transaction,[55] (2) facts not reasonably discoverable,[56] and (3) facts within the scope of a fiduciary relationship — the fiduciary-relationship exception is the most troublesome because it is potentially the most wide-ranging. Consequently, courts should exercise great care in interpreting the meaning of this exception. The question is to what extent this exception requires an attorney to disclose adverse facts about credentials or experience, even if those facts are not basic to the transaction or are reasonably discoverable by the client.

Some courts have said that attorneys owe clients a duty of "absolute and perfect candor."[57] The phrase "absolute and perfect candor," however, is an overstatement of an attorney's disclosure obligations, for in many contexts the law imposes no more than a duty of reasonable care to keep a client informed of relevant matters.[58] Still, where the interests of the lawyer and client clearly are adverse — as in the case of a business transaction between the two — the attorney's duty is essentially one of absolute and perfect candor.[59]

A fiduciary never has a duty to reveal immaterial information,[60] or information that is unreliable[61] or already known to the beneficiary.[62] Assuming

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55. *See supra* Part II.A.1.

56. *See supra* Part II.A.2.

57. *See* Johnson, *Candor*, *supra* note 4, at 753-70 (discussing recent cases from Texas, California, Oklahoma, and the District of Columbia).

58. *Id.* at 775-76 (stating that "nonnegligent failure to furnish information to a client" will not ordinarily give rise to civil liability).

59. *See* Holland v. Brown, 66 S.W.2d 1095, 1102 (Tex. App. 1933) (stating that "[t]he failure of an attorney dealing with his client to disclose to him the material facts and the legal consequences flowing from the facts constitutes actionable fraud"); *see also* Cummings v. Sea Lion Corp., 924 P.2d 1011, 1021 (Alaska 1996) (finding an attorney liable for fiduciary fraud for failing to disclose to client corporation that the attorney would only be paid if the transaction between the corporation and a previous client was successful); Johnson, *Candor*, *supra* note 4, at 770-78 ("Judicial decisions irrefutably establish that business transactions between lawyer and client are presumptively fraudulent. Such dealings will not survive scrutiny unless the lawyer proves that the highest standards of disclosure and fair dealing were observed. . . . In such cases . . . it is accurate to say that attorneys have a duty of 'absolute and perfect candor.'").

60. *See, e.g.*, STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72 (Minn. 2002) (holding that a law firm did not breach its fiduciary duties by failing to disclose immaterial information).

61. *See* Johnson, *Candor*, *supra* note 4, at 783 (noting that "[u]nreliable information is one type of information that may be found to lack materiality").

62. *See id.* at 785-87 (recognizing that "little would be gained by mandating disclosure of information already possessed by the client").

that none of these limits apply, suppose, for example, that a client is unaware that an attorney has never handled a case of the type for which the client wishes to engage representation. The absence of prior experience is not unreliable because it is a fact known with certainty to the lawyer. The fact is not known to the client. And, the matter is material because even though it might not be the decisive consideration, it would logically be given some weight during the client's selection of counsel. Must the lawyer disclose to the client the lack of prior experience because there is a fiduciary duty to speak?

Conventional wisdom would say that there is no fiduciary duty to disclose adverse information about lack of experience before the attorney-client relationship comes into existence.[63] Until that moment, the lawyer does not owe a prospective client the full range of fiduciary duties that are owed to clients.[64] The lawyer, however, arguably cannot continue to be silent regarding the adverse facts once entering into a relationship with a client. While some may argue that it is too late to require disclosure of the adverse information because the client has already hired the lawyer, this cannot be true for several reasons. First, a client may discharge an attorney at any time, with or without cause,[65] subject to liability for unpaid attorney's fees.[66] The lawyer's nondisclosure of information about lack of experience bears on the client's exercise of the right to terminate the engagement. Second, the interests of the lawyer and client are arguably adverse — the lawyer would like the relationship to continue, but the client, upon learning of the lawyer's lack of experience or credentials, might prefer to terminate it. In this situation does the law impose a duty of "absolute and perfect candor," the violation of which will subject the lawyer to liability for fraud?

A mechanical reading of fiduciary duty law might lead to the conclusion that disclosure of the lack of experience is required. Yet common sense dictates a contrary result. It would be absurd to permit a lawyer to not disclose unfavorable information before signing a client, but then require the lawyer to reveal the information immediately thereafter. Once the attorney-client relationship has come into existence, the lawyer should be focused on making the relationship work, rather than on revealing prior adverse information that

63. A potential client inquiring about legal services does not qualify as a client until the lawyer consents to provide legal services or knows or should know that the potential client is relying on the lawyer to provide legal services. RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 1, § 14(1).

64. *Id.* § 15 cmt. b (stating that "prospective clients should receive some but not all of the protection afforded clients").

65. *Id.* § 32; *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.5.2, at 545 (1986) ("It is now uniformly recognized that the client-lawyer contract is terminable at will by the client.").

66. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 1, § 40.

might undo the relationship or make it less productive. The attorney's fiduciary obligation should be to work as hard as possible to ensure that the representation is successful, rather than to reveal negative past information that might induce "buyer's remorse."

Courts should hold that if silence about unfavorable credentials or experience was proper before the commencement of the relationship because the facts were not basic to the transaction[67] or were reasonably discoverable,[68] continued silence after the relationship begins is ordinarily also acceptable. Thus, the focus concerning past information relating to credentials and experience should be on whether the attorney acted properly in terms of what was said before the initiation of the relationship. This approach is reasonable, provided that no new developments in the representation directly call for disclosure of past facts, such as a request by the client for information relating to the subject.[69]

Fiduciary duty law largely falls within the competence of the courts. Absent legislative restrictions, courts are free to shape that body of law in a manner that is likely to be most conducive to the common good.[70] The recommended rule would promote stability in lawyer-client relationships and would also minimize the risk that the slightest failure to disclose adverse information, which there was originally no duty to reveal, might be inflated into the predicate for a malpractice action or a request for fee forfeiture. Lawyers would still remain subject to liability for failure to disclose facts basic to the transaction[71] and facts not

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67. *See supra* Part II.A.1.

68. *See supra* Part II.A.2.

69. There may be circumstances short of a direct request that call for disclosure. For example, suppose that a client relates to the lawyer a story in the newspaper about an attorney who was sanctioned for abusive litigation tactics, and then says, "I sure would not want to be represented by a jerk like that." If the client's lawyer has been subject to similar sanctions, the lawyer has a duty to disclose those facts to correct the client's known misimpression about a material subject. *See supra* note 24.

70. In shaping the law of legal malpractice, courts have departed from well-established principles where it was sensible to do so. In *McPeake v. William T. Cannon, Esq.*, 553 A.2d 439 (Pa. Super. Ct. 1989), an attorney was sued for malpractice after representing a criminal client who jumped to his death from the courthouse window when his guilty verdict was returned. The suicide was foreseeable because the client had previously threatened to kill himself and thus, under ordinary principles of proximate causation, the client's death was legally caused by the attorney's alleged negligence. *Id.* at 442. However, the court determined that the attorney could not be held liable even if the lawyer's negligence had precipitated the suicide because to impose such a risk would discourage attorneys from representing "a sizeable number of depressed or unstable criminal defendants," and defeat the important goal of making legal counsel available to those who need it. *Id.* at 443.

71. *See supra* Part II.A.1 (discussing the duty to disclose facts "basic to the transaction").

reasonably discoverable,[72] and, as discussed below, for false[73] and misleading[74] statements, failure to obtain informed consent,[75] and negligent misrepresentation.[76]

The recommended rule would require a lawyer to provide prior information about credentials and experience when that information is requested or directly relevant to the representation. This is true because lawyers are under a broadly applicable obligation to act reasonably in practicing law. Lawyers must respond to legitimate requests for information and must keep clients reasonably informed about relevant matters.[77] Beyond this duty of reasonable care,[78] courts should not blindly impose a duty of absolute and perfect candor on attorneys to relate information about credentials or experience. A client who hires an attorney has no legitimate expectation that the attorney will divulge every unfavorable fact relating to the attorney's credentials or experience. Rather, one expects an attorney to disclose what is important, to overlook what is not, and to exercise reasonable judgment in between. Client expectations are important because "[t]he crucial element in determining whether a duty of disclosure exists is whether the mistaken party would reasonably expect disclosure."[79]

Furthermore, a rule imposing a duty of absolute and perfect candor with regard to disclosure of an attorney's credentials and experience would set an unattainable standard. Lawyers might never finish reciting the dullest passages of their personal histories if the law required "absolute and perfect" disclosure of information about credentials or experience.[80] In addition, the important disclosures would be lost amidst the tide of other less-useful information. Finally, little would be gained, from the standpoint of imposing legal liability, by requiring disclosure of facts so old, unreliable, minor, or immaterial that reasonable care would not call for their disclosure. In the end, a plaintiff

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72. *See supra* Part II.A.2 (discussing the duty to disclose facts that are "not reasonably discoverable").

73. *See infra* Part II.C (discussing liability for outright lies).

74. *See infra* Part II.B (discussing liability for potentially misleading statements).

75. *See infra* Part III.B (discussing liability for failure to obtain informed consent).

76. *See infra* Part III.A (discussing liability for negligent misrepresentation).

77. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 1, § 20.

78. For a fairly characteristic explanation of the disclosure obligations that the law of negligence imposes on lawyers, see *Sierra Fria Corp. v. Donald J. Evans, P.C.*, 127 F.3d 175, 179-82 (1st Cir. 1997).

79. Fleming Cos. v. Krist Oil Co., 324 F. Supp. 2d 933, 946 (W.D. Wis. 2004) (quoting Hennig v. Ahearn, 601 N.W.2d 14, 22 (Wis. Ct. App. 1999)).

80. *But see* Lerman, *supra* note 2, at 683 ("[I]f lawyers were more candid about the extent of their experience and about their own judgment that they could handle work in a new area, the flow of business into the law firms might largely be unaffected. The lawyers might communicate confidence in their own abilities without lying about their expertise.").

alleging fraud or claims based on negligence must prove that the misrepresentation caused reliance and damage.[81] That will be difficult or impossible to show if the facts relating to credentials or experience are so slight that reasonable care would not call for revelation. Similarly, nondisclosure of such facts will rarely support a claim for fee forfeiture because that remedy is normally available only where a breach of fiduciary obligations is a "clear and serious violation of a duty."[82]

The course recommended here for imposing disclosure obligations is consistent with decided cases. In a number of instances, courts have been reluctant to require professionals to disclose facts about their personal lives or information about credentials. A Georgia case, for example, held that a physician did not have a duty to disclose his drug-use problems to a patient.[83] In a case in Hawaii,[84] a doctor's failure to disclose that he was not a board

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81. *See infra* Part II.D.2.

82. RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 1, § 37.

83. *See* Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d 777 (Ga. 2000). The *Cleveland* court found "compelling public policy reasons that militate against creating an independent cause of action for . . . a professional's failure to disclose life factors that might be detrimental to the rendering of services to patients or clients[, including] the impossibility of defining which of a professional's life factors would be subject to such a disclosure requirement." *Id.* at 781-82. The court compared the situation in *Cleveland* to a hypothetical situation involving an attorney:

> Consider an attorney who, on most nights, drinks between four and five glasses of wine between the time he arrives home from work and the time he retires for the evening. He is never intoxicated or hung over at work, and he never misses or is late for a work-related event. No one has ever suggested to him, and he does not suspect, that his wine drinking affects his professional performance. However, his doctor informs him that he may be a "binge drinker," and may have a drinking problem. . . . Having been so informed, does the attorney have an affirmative duty to disclose this life factor — a diagnosed drinking problem which conceivably could affect his professional performance — to every current and prospective client? If so, does his failure to make such disclosure create a cause of action against him regardless of whether his work is competently performed? What if the lawyer is aware that his client is opposed to the drinking of alcohol on moral or religious grounds, does that create a heightened duty of disclosure on the lawyer's part with regard to that particular client?

Id. at 782 n.19. These questions, the court found, illustrate "the uncertainty that would ensue" from a decision requiring disclosure of life factors. *Id.* However, the court may have reached the wrong decision. The facts in *Cleveland* were egregious. The patient alleged that the defendant doctor fraudulently concealed his illegal cocaine use and resulting impairment and "negligently performed unnecessary surgery for non-existent penile cancer." *Id.* at 778-79. An argument can be made that the exercise of reasonable care in this case required disclosure by the doctor of his illegal drug use.

84. *See* Ditto v. McCurdy, 947 P.2d 952 (Haw. 1997).

certified plastic surgeon was held not to be a breach of fiduciary duty.[85] These cases from the medical field reinforce the conclusion that courts should act carefully when defining the disclosure obligations of attorneys. A lawyer should be required to reveal adverse facts relating to credentials or experience only when a fiduciary is reasonably expected to reveal those facts or special circumstances make those facts directly relevant to the representation.

B. Potentially Misleading Statements

1. Half-Truths

Although there may be no duty to speak on the subject of credentials and experience, an attorney who elects to do so must be mindful of the rule on half-truths.[86] A story cannot be told in such a way that it is so incomplete that it poses a grave risk of misleading the listener.[87] This rule applies with particular force to attorneys. Thus, one court stated:

> A person must be able to trust a lawyer's word as the lawyer should expect his word to be understood, without having to search for equivocation, hidden meanings, deliberate half-truths or camouflaged escape hatches.[88]

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85. The doctor was "certified as, and held himself out to be, an otolaryngologist, facial surgeon, and cosmetic surgeon" and "made no active representations to the contrary, nor did he conceal his qualifications." *Id.* at 958. The court stated that "[u]nder the circumstances" the physician had no affirmative duty to disclose his qualifications or lack thereof to the patient. *Id.* The court further concluded that because the jury instructions said that the doctor had "*an affirmative duty* to exercise the utmost good faith, integrity, fairness, and fidelity, and *to disclose material facts to the patient regarding the doctor's qualifications to perform the procedures contemplated by the patient*," the jury instructions were erroneous. *Id.* at 959.

86. *See* RESTATEMENT OF TORTS, *supra* note 1, § 529 (providing that "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation"); *see also* Meade v. Cedarapids, Inc., 164 F.3d 1218, 1222 (9th Cir. 1999) (quoting Gregory v. Novak, 855 P.2d 1142, 1144 (Or. Ct. App. 1993), for the proposition that "[o]ne who makes a representation that is misleading because it is in the nature of a half-truth assumes the obligation to make a full and fair disclosure of the whole truth") (internal quotations and alterations omitted); *In re* Greene, 620 P.2d 1379, 1383 (Or. 1980); Morales v. Morales, 98 S.W.3d 343, 347 (Tex. App. 2003) (stating "when one voluntarily discloses information, he has a duty to disclose the whole truth rather than making a partial disclosure that conveys a false impression").

87. "[O]ne who voluntarily elects to make a partial disclosure is deemed to have assumed a duty to tell the whole truth . . . even though the speaker was under no duty to make the partial disclosure in the first place." Union Pac. Res. Group, Inc. v. Rhone-Poulenc, Inc., 247 F.3d 574, 584 (5th Cir. 2001).

88. *In re* Conduct of Hiller, 694 P.2d 540, 544 (Or. 1985) (holding that an attorney who stated that property had been sold, but failed to disclose the pro forma character of the transfer,

For example, a lawyer cannot state that she was awarded a degree by a university, without mentioning that the degree was later revoked;[89] that she is licensed to practice law, without saying that she is now on inactive status;[90] or that she applied for board certification as a specialist, without indicating that her application was rejected.[91]

However, something is not a half-truth merely because negative information of some sort could be revealed about the speaker that has not yet been disclosed. Rather, a half-truth exists, and additional disclosure is required, only when the undisclosed facts are so directly related to the initial statement, or so pertinent to an understanding of the subject, that the recipient of the initial statement would feel seriously misled about that particular assertion of fact.[92] This nexus requirement is important, for otherwise, the half-truth rule might be read so broadly as to devour both the general rule that countenances silence and the exceptions that impose a duty to speak.

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in order to trigger an opponent's repayment obligations under a promissory note, violated a disciplinary rule prohibiting misrepresentation).

89. *See generally* Bernard D. Reams, Jr., *Revocation of Academic Degrees by Colleges and Universities*, 14 J.C. & U.L. 283, 301 (1987) (stating that "both public and private universities possess the authority to revoke degrees already conferred").

90. *See In re* Conduct of Kumley, 75 P.3d 432, 435 (Or. 2003) (holding that an inactive attorney's misconduct in describing himself as an "attorney" on forms that he submitted to two state agencies in connection with his candidacy for the state legislature warranted reprimand).

91. *Cf.* RESTATEMENT OF TORTS, *supra* note 1, § 529 cmt. a ("[A] statement by a vendor that his title has been upheld by a particular court is a false representation if he fails to disclose his knowledge that an appeal from the decision is pending.").

92. *See, e.g.*, Fid. Mortgage Co. v. Cook, 821 S.W.2d 39, 43 (Ark. 1991) (imposing liability based on failure by a bank to disclose that it lacked the capacity to fund a loan that it had committed to make); Randi W. v. Muroc Joint Unified Sch. Dist., 60 Cal. Rptr. 2d 263, 272-73 (Cal. 1997) (involving letters of recommendation that cast an administrator in a positive light without mentioning prior complaints of his sexual impropriety with students); Kannavos v. Annino, 247 N.E.2d 708, 711 (Mass. 1969) (holding that where houses were advertised as investment properties and were being rented to the public for multifamily purposes, the vendors were bound to disclose to purchasers that multifamily use of the houses violated zoning laws because "[a]lthough there may be no duty imposed upon one party to a transaction to speak for the information of the other if he does speak with reference to a given point of information, voluntarily or at the other's request, he is bound to speak honestly and to divulge all the material facts bearing upon the point that lie within his knowledge") (internal alterations and quotations omitted); Junius Constr. Corp. v. Cohen, 178 N.E. 672, 674 (N.Y. 1931) (Cardozo, J.) (holding that while a vendor of property was under no duty to mention planned streets, having disclosed two of them, he was obliged to reveal a third street which, if opened, would divide the plot in half); Columbia/HCA Healthcare Corp. v. Cottey, 72 S.W.3d 735, 744 (Tex. App. 2002) (stating that partial disclosure about a retirement plan was fraudulent because it failed to indicate that the plan could be rescinded at any time).

2. Opinions, Puffing, State of Mind, and Implicit Statements of Fact

Some contend that an action for fraud must be based on a misrepresentation of fact and that a mere assertion of opinion is an insufficient predicate for legal liability. This is an overstatement, however, because in some instances, a misleading statement of opinion will suffice as the basis for a fraud action.[93] Not surprisingly, many of the cases falling within this important exception involve professionals. If a doctor, lawyer, or other professional knows of the misleading nature of her statement of opinion, or acts with reckless indifference thereto, a layperson who detrimentally relies may be entitled to sue for damages.

In sorting out which statements of opinion by lawyers relating to credentials or experience may give rise to liability, several distinct rules that have evolved from the misrepresentation cases should be considered. These rules concern (1) puffing, (2) misrepresentation of state of mind, and (3) implicit statements of fact.

Puffing is sales talk, language that casts a rosy glow over a transaction, but says nothing specific about the facts.[94] Words like "fine," "first-class," and "best" are typical examples of puffing. According to a longstanding rule of tort law, puffing is permissible.[95] This makes good sense. "Puffing" by sellers often renders difficult, burdensome, or annoying transactions a bit more pleasant or tolerable, and it also greases the wheels of the economy by increasing the frequency of commercial exchange. "Puffing" is as important in the legal field as any other course of endeavor, for the economic realities of law practice cannot be ignored.

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93. Thus, it was written more than a century ago:

> Generally speaking, the representations must be as to a material fact, susceptible of knowledge; and, if they appear to be mere matters of opinion or conjecture, they are not actionable. There are many cases, however, in which even a false assertion of an opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely upon what is stated or represented. Thus, the liability may arise where one has or assumes to have knowledge upon a subject of which the other is ignorant, and knowingly makes false statements, on which the other relies.

Hedin v. Minneapolis Med. & Surgical Inst., 64 N.W. 158, 159 (Minn. 1895).

94. *See* PROSSER AND KEETON ON TORTS, *supra* note 3, at 757 (stating that "sales talk, or puffing, . . . is considered to be offered and understood as an expression of the seller's opinion only, . . . on which no reasonable man would rely").

95. *See* Miller v. William Chevrolet/GEO, Inc., 762 N.E.2d 1, 7 (Ill. App. Ct. 2001) (stating that "[p]uffing is defined as a bare and naked statement as to value of a product and is considered a nonactionable assertion of opinion") (internal quotations omitted); Prudential Ins. Co., v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 163 (Tex. 1995) (stating that representations by a vendor that a "building was 'superb,' 'super fine,' and 'one of the finest little properties in the City of Austin'" were merely puffing and could not constitute fraud).

> Impressing prospective clients is a prerequisite to successful private law practice. . . . [L]awyers face considerable pressure to bring in new clients. A solo practitioner needs new clients to pay the rent and meet the payroll. In large firms, each lawyer must attract business in order to become a partner and to earn a share of the profits.
>
> After a client has hired a lawyer or a firm, the problem of making a good impression changes. Lawyers must maintain and cultivate their clients' initial positive impressions . . . .[96]

Not surprisingly, lawyers routinely engage in puffing and do not consider it improper.[97] Like everyone else, attorneys may contend that the glass is half full, rather than half empty. As the Second Circuit recently wrote: "It can be expected that any professional will convey to potential clients a healthy self-estimation."[98] Any theory of liability for attorney misrepresentation of credentials or experience must accommodate the rule that says that puffing is permissible. However, statements that extend beyond expressing a favorable opinion, and instead assert false facts, are actionable. There is an important difference between a flattering characterization and a gross exaggeration.[99] In addition, puffing is subject to at least two important limitations. The first concerns state of mind, and the second concerns implicit factual assertions.

As Lord Bowen famously said, "The state of a man's mind . . . is as much a fact as the state of his digestion."[100] If a plaintiff can prove that the defendant misrepresented his state of mind when uttering an opinion, the defendant may be liable. This rule applies to doctors[101] and lawyers,[102] as well as other

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96. *See* Lerman, *supra* note 2, at 662.

97. *See id.* at 721-23. With respect to their expertise, "[m]any lawyers argue that puffing is harmless as long as clients do not have to pay for the extra time the lawyer takes to acquire expertise" and "do not consider what they characterize as 'puffing' to be lying." *Id.* at 753.

98. Baker v. Dorfman, 239 F.3d 415, 423 (2d Cir. 2000); *see also* Griffin v. Fowler, 579 S.E.2d. 848, 853 (Ga. Ct. App. 2003) ("In the absence of false or grossly misleading statements which evidence an intent to create a false impression of expertise or experience, it is not fraud for an attorney to convey to a potential client a healthy self-estimation of ability.").

99. *Baker*, 239 F.3d at 423 (finding that statements in an attorney's resume went beyond puffing and "were either false or grossly misleading, and created the false impression . . . of an experienced litigator"); *see also supra* note 13 and accompanying text.

100. Edgington v. Fitzmaurice, L.R. 29 Ch. Div. 459, 483 (1885).

101. *Cf.* Hedin v. Minneapolis Med. & Surgical Inst., 64 N.W. 158, 159-60 (Minn. 1895) ("The doctor, with his skill and ability, should be able to approximate to the truth when giving his opinion . . . . If he . . . does not believe the statement true, . . . but represents it as true, . . . it is to be inferred that he intended to deceive. . . . [A]n action for deceit will lie.").

102. *See* Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1184 (N.Y. 1995) (holding that a law firm stated a claim by alleging that the defendant attorney

defendants.[103] Suppose that an attorney says that he has extensive experience in a particular area of the law, a good track record in a certain type of case, or unbeatable credentials. If the plaintiff can prove that the attorney lacked confidence in the facts that the assertion implied, damages may be available.[104] It will be hard to unearth the needed proof because the attorney will likely claim that he believed the statements made. But the discovery process in litigation often reveals the unexpected. Business records, correspondence, or statements in depositions by colleagues or former employees may supply the evidence the plaintiff needs to show misrepresentation of the attorney's state of mind.

In addition, every statement of opinion carries with it at least two implicit statements of fact: first, that the speaker has some factual basis for uttering the view expressed, and second, that the facts known to the speaker are not wholly inconsistent with the opinion voiced.[105] A lawyer cannot say that he is "good at oil and gas law," if he knows nothing about the subject,[106] nor can he make that claim if he has recently been held liable for malpractice based on incompetence in that field.

An example of an expression of opinion giving rise to an implicit statement of fact can be drawn from the medical context. Predictions of success, as mere opinions about the future, typically are not actionable.[107] In an early case, however, a court stated:

"represented orally to the partnership that he . . . would act to ensure the future of the firm . . . when he never intended to do so"); Martin v. Ohio State Univ. Found., 742 N.E.2d 1198, 1205 (Ohio Ct. App. 2000) (stating, in a suit against a lawyer, that misrepresentation of "existing mental attitude" is actionable).

103. *Cf.* Bogle v. Bragg, 548 S.E.2d 396, 400 (Ga. Ct. App. 2001) (stating, in a case against company directors and a corporate attorney, that a claim for fraud cannot lie on representations as to future events, "except that fraud may be predicated on a promise made with a present intention not to perform").

104. In such a case, the defendant's proven lack of confidence in what was said will establish both the fact that state of mind was misrepresented and scienter, for one way to prove scienter is to show that the maker of the statement did "not have the confidence in the accuracy of his representation that he state[d] or implie[d]." RESTATEMENT OF TORTS, *supra* note 1, § 526(b).

105. *Id.* § 539; *see also* Crown Cork & Seal Co. v. Hires Bottling of Chic., 371 F.2d 256, 258 (7th Cir. 1967).

106. *See, e.g.*, Baker v. Dorfman, 239 F.3d 415, 424 & n.24 (2d Cir. 2000) (holding an attorney liable for resume fraud for claiming, among other things, that he acted as "regular counsel to public and private companies in connection with regulatory issues under the Americans with Disabilities Act," when he had never done any such work).

107. *See* Maness v. Reese, 489 S.W.2d 660, 663 (Tex. App. 1972) (stating that "predictions and opinions do not serve as a basis for actionable fraud"); PROSSER AND KEETON ON TORTS, *supra* note 3, at 762 (stating that "[o]rdinarily a prediction as to events to occur in the future is to be regarded as a statement of opinion only, on which the adverse party has no right to rely").

> The plaintiff, an illiterate man, badly injured in an accident . . . consulted with the physician . . . as to his condition and the probability of a recovery. After an examination by the surgeons, he was positively assured . . . that he could be cured, and by treatment at that institute could and would be made sound and well. . . . [T]here was something more in defendants' [sic] statements than the mere expression of his opinion upon a matter of conjecture and uncertainty. It amounted to a representation that plaintiff's physical condition was such as to insure a complete recovery.[108]

Presumably, a similar analysis regarding implied facts may apply in the legal field, not only with respect to predictions of future success, but also statements of opinions about credentials or experience.

C. Outright Lies

Scholars say that "[d]eception by omission and by commission are morally identical: the purpose and the consequences are the same."[109] Yet it is often easier to condemn a bold-faced lie, than to censure nondisclosure or decry an incomplete statement. Not surprisingly, there are many cases holding attorneys liable for deliberately false statements.[110] Fraudulent entries on a resume[111] or a website relating to credentials or experience are illustrations. Because honesty is highly relevant to job performance by lawyers, a false statement by an attorney on a job application about class rank or other academic information will often be regarded as material.[112]

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108. Hedin v. Minneapolis Med. & Surgical Inst., 64 N.W. 158, 159-60 (Minn. 1895). The court indicated that if the implicit assertion was knowingly false, an action for deceit would lie. *See id.* at 160.

109. *See* Lerman, *supra* note 2, at 663.

110. *See, e.g.*, McKinnon v. Tibbetts, 440 A.2d 1028, 1029 (Me. 1982) (holding an attorney liable for fraud based on falsely assuring a client that he "was pursuing the claim even though he was not taking any action").

111. *See Baker*, 239 F.3d at 423 (affirming a finding that an attorney committed fraud where representations in the attorney's resume were "either false or grossly misleading, and created the false impression [that the attorney was] an experienced litigator").

112. *See* Miller v. Beneficial Mgt. Corp., 855 F. Supp. 691 (D.N.J. 1994). In *Miller*, the plaintiff falsely stated her grade point average, class rank, and other information. *Id.* at 697 & nn.6 & 7. In addressing discrimination issues, the court wrote:

> Resume fraud asserted in support of an after-acquired evidence defense must be material, directly related to measuring a candidate for employment, and must have been relied upon by the employer in making the hiring decision. . . .
>
> Miller's misrepresentations, if proven to be intentional, would certainly fulfill this standard. As an attorney, and an applicant for a job as an attorney, Miller was required and expected to maintain the highest standard of veracity and integrity.

In many instances, the issue is not what constitutes a lie, but whether a particular statement was ever made. The issue of whether an attorney previously lied about credentials or experience will often turn on conflicting versions of what was orally expressed during the commencement or continuance of legal representation. The client will testify that the lawyer said one thing, which if credited by the jury, will mean that the lawyer lied. The lawyer, in contrast, will deny that the statement was ever made. The question of legal liability for fraud will hang in the balance.

D. Other Considerations

1. Scienter

Regardless of whether an action for fraud is based on nondisclosure, a misleading statement, or an utter falsehood, the plaintiff must prove scienter, a particular culpable state of mind. In general, "scienter" is established by evidence showing that the defendant acted with knowledge of falsity or reckless disregard for the truth.[113] Section 526 of the *Restatement (Second) of Torts* is somewhat more precise. The *Restatement* provides that a misrepresentation is "fraudulent" — that is to say, made with scienter — if the speaker "(a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies."[114] If there is evidence that a lawyer, with respect to credentials or experience, deliberately failed to disclose material information when there was a duty to speak, knew that what was uttered was misleading, or intentionally falsified the facts, scienter will be established.

2. Intent to Induce Reliance

Cases frequently say that to be liable in fraud for damages based on misrepresentation, the defendant must not only act with scienter,[115] but also must intend to defraud the plaintiff.[116] This a slight overstatement, however, because

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> The Rules of Professional Conduct, in fact, make it professional misconduct for a lawyer to *inter alia* engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Id. at 710 n.22 (internal citations, quotations, and alterations omitted).

113. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.10, at 826 (5th ed. 2000).

114. RESTATEMENT OF TORTS, *supra* note 1, § 526.

115. *See supra* Part II.D.1.

116. *See* Jean v. Tyson-Jean, 118 S.W.3d 1, 9 n.9 (Tex. App. 2003) (stating that "[b]ecause appellant testified there was no 'intention' on the part of [others] to defraud her, actual fraud could not have been proved").

expectation of reliance will suffice as a basis for liability, even if the defendant does not desire to induce reliance.[117]

Cases in which the defendant misrepresents material facts about credentials or experience while dealing directly with the plaintiff pose few problems. The dealings between the parties will show that reliance was highly foreseeable to, if not plainly desired by, the defendant. Difficult questions may arise, however, in cases where there are no personal dealings between the parties, and no evidence of intent on the part of the defendant for a particular false or misleading message to be conveyed to the plaintiff. In these cases, it may be useful to differentiate written misrepresentations from oral misrepresentations.

The *Restatement* contains a provision addressing written misrepresentations "incorporated in [a] document or other thing."[118] According to the commentary, "the maker of a fraudulent misrepresentation incorporated in a document has reason to expect that it will reach and influence any person whom the document reaches."[119] This would seem to suggest that, in cases of resume fraud, anyone whom the resume reaches may rely on its contents and sue for damages. One might, by analogy, argue that the same rule also applies to misstatements incorporated into websites, which are the electronic equivalent to documents. However, at least one caveat must be noted. Despite the breadth of the *Restatement's* comment, the blackletter rule is written in tighter terms. The rule reads:

> One who embodies a fraudulent misrepresentation in an article of commerce, a muniment of title, a negotiable instrument or a similar commercial document, is subject to liability for pecuniary loss caused to another who deals with him or with a third person regarding the article or document in justifiable reliance upon the truth of the representation.[120]

Thus, it can be argued that a resume or a website, even if it misrepresents credentials or experience, is not a "commercial document" that is "similar" to the type of "article of commerce, . . . muniment of title, [or] . . . negotiable instrument" with which the blackletter rule is concerned.[121]

Different problems are posed by oral misrepresentations regarding credentials or experience that reach someone other than the intended recipient. The

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117. RESTATEMENT OF TORTS, *supra* note 1, § 531 (stating that liability for fraud extends to persons whom the defendant "intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation").

118. *See id.* § 532.

119. *Id.* § 532 cmt. b.

120. *Id.* § 532.

121. *See id.*

commentary to the *Restatement's* general rule on "expectation of influencing conduct"[122] states that a general risk of reliance, inherent in virtually every misrepresentation, is insufficient for liability.[123] Rather:

> The maker of the misrepresentation must have information that would lead a reasonable man to conclude that there is an especial likelihood that it will reach those persons and will influence their conduct . . . .[124]

In nonattorney contexts, some courts have gone to great lengths to indicate that foreseeable reliance is not sufficient to allow a third party to sue for fraud.[125] It would not be surprising to see a similarly rigorous standard applied to cases in which attorneys are alleged to have misrepresented their credentials or experience. In states following the *Restatement* rule, a plaintiff would have to prove that the facts demonstrated an "especial likelihood" that the plaintiff would rely upon the misrepresentation. Presumably, liability would be imposed only in instances where the lawyer knew or had a particular reason to foresee that the misrepresentation of credentials or experience would reach the plaintiff, who would rely thereon.

3. Reliance, Causation, and Damages

A cause of action for fraud protects the plaintiff's decision-making process from being infected by false, misleading, or incomplete information. No harm is caused by a misrepresentation, however, unless the plaintiff relies. Accordingly, in every fraud action the plaintiff must prove both reliance[126] and that reliance caused damages.[127]

It may be difficult to establish reliance on a misrepresentation in cases where the client is sophisticated about business matters or has other legal counsel, for

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122. *Id.* § 531.

123. *Id.* § 531 cmt. d.

124. *Id.*

125. *See* Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573 (Tex. 2001) (embracing a reason-to-expect-reliance standard that requires more than foreseeability).

126. *See, e.g.*, Kennedy v. Venrock Assocs., 348 F.3d 584, 592 (7th Cir. 2003); *see also* DAN B. DOBBS, THE LAW OF TORTS § 474, at 1358 (2000).

127. *See, e.g.*, Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 586 S.E.2d 507, 512 (N.C. Ct. App. 2003). Of course, dishonest conduct causes other harm beyond the forms of damage that are legally cognizable in an action for fraud. *See* Lerman, *supra* note 2, at 679-84 (discussing the harm caused by lawyer deception of clients, including professional harm to the reputation of individual lawyers and the bar as a whole, damage to lawyers' internal standards of integrity, perpetuation of hidden errors, damage to the lawyer-client relationship, and damage to relationships between lawyers).

in such cases, it is less likely that the client was in fact misled.[128] Of course, client sophistication or access to legal counsel are only two considerations in assessing whether reliance occurred; there are many others. In particular, if the plaintiff knew of the falsity of the representation[129] or the existence of the undisclosed fact[130] before making the decision in question, reliance cannot be proved. Thus, if a client knows that a lawyer's assertion about experience or credentials is false, an action for fraud will not be successful.

In addition, if there are "danger signals" that would cause a reasonable person to inquire,[131] and the plaintiff fails to do so, the plaintiff may be estopped from claiming reliance.[132] However, if there is nothing to cause the plaintiff to distrust the defendant's claims other than the defendant's self-interest, the plaintiff typically may accept the defendant's affirmative statements at face value and need not conduct an investigation to determine whether they are true.[133] "[T]he victim of a misrepresentation has no duty to investigate the

128. *See* Coastal Bank SSB v. Chase Bank, N.A., 135 S.W.3d 840, 842-43 (Tex. App. 2004) (In addressing communications between two banks, the court noted that "[t]his was an arm's length transaction between two sophisticated financial institutions who were both represented by counsel. While such a relationship is not, standing alone, dispositive of the issue of reliance, it is a factor to be considered."); *see also* Williams Ford, Inc. v. Hartford Courant Co., 657 A.2d 212, 222 (Conn. 1995) (holding that reliance was not assumed in communications between sophisticated commercial parties, but was a question of fact).

129. *See* Richter v. Wagner Oil Co., 90 S.W.3d 890, 896 (Tex. App. 2002) (stating in the context of business litigation that a party who has learned that a representation is false cannot rely upon it and then sue).

130. *See* Miller v. Kennedy & Minshew, P.C., 142 S.W.3d 325, 343-44 (Tex. App. 2003) (holding that where client discovered facts allegedly withheld by the attorney, yet continued the representation, the law firm was not prevented from collecting its contingent fee by reason of having engaged in misleading and deceptive conduct).

131. Typically, a client will have less reason to investigate the facts when dealing with a lawyer than when dealing with another person in an arm's length relationship. *See* Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) ("As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation. The client must feel free to rely on his attorney's advice. Facts which might ordinarily require investigation likely may not excite suspicion where a fiduciary relationship is involved.") (internal citations omitted).

132. *See* Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987). In *Greycas*, the defendant required a loan applicant to supply an attorney's opinion letter containing assurances that there were no prior liens on the equipment that was to serve as security. *Id.* at 1562. The court held that the defendant finance company could rely upon the attorney's assurances, even though it would not have been hard for it to conduct its own UCC lien search. *Id.* at 1566. If, however, the opinion letter had disclosed that the attorney was the loan applicant's brother-in-law, that "might have been a warning signal that [the finance company] could ignore only at its peril" and that "[t]o go forward in the face of a known danger is to assume the risk." *Id.*

133. *See* Judd v. Walker, 114 S.W. 979, 981 (Mo. 1908) (stating that the plaintiff could rely upon the defendant's definite statement as to the acreage of land and was not required to measure the property himself because one need not deal "with [one's] fellow man as if he was

truthfulness of the deceit . . . ."[134] This rule is particularly applicable where the party making the statement is a lawyer, a person professionally bound to avoid conduct involving "dishonesty, fraud, deceit, or misrepresentation."[135] For example, in a case involving an attorney's false statement to opposing counsel during settlement negotiations about the amount of insurance coverage that was available, the Indiana Supreme Court stated:

> We decline to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.[136]

Consequently, a lawyer who lies about credentials ordinarily will not be permitted to argue that a client or prospective client should not have trusted the lawyer's representations.

With regard to proving that a misrepresentation about credentials or experience caused damage, a recent Texas case from the medical field[137] is instructive. In this case, the plaintiff alleged that the defendant-physician had fraudulently induced him to consent to surgery by telling him that he had performed arthroscopy on football star Troy Aikman when, in actuality, he had never performed arthroscopy on anyone.[138] The appellate court held that even if the trial court erred in dismissing the plaintiff's claim for fraud, the error was harmless because the plaintiff failed to show that the physician was negligent in performing patient's surgery or in caring for him thereafter, and thus, the alleged misrepresentation did not injure the plaintiff.[139]

In the context of an attorney's misrepresentation of credentials or experience, there may be difficult questions regarding what the plaintiff must prove by way of actionable harm. If the lawyer was engaged to conduct litigation, some courts may require the plaintiff to show that, "but for" the misrepresentation, the case

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a thief or a robber").

134. Chapman Lumber, Inc. v. Tager, No. CV010086006S, 2003 WL 22080469, at *4 (Conn. Super. Ct. Aug. 22, 2003).

135. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2002).

136. Fire Ins. Exch. v. Bell, 643 N.E.2d 310, 313 (Ind. 1994).

137. *See* Byington v. Mize, No. 05-00-00786-CV, 2002 WL 1494219 (Tex. App. July 15, 2002) (involving claims for fraudulent inducement, constructive fraud, and negligent misrepresentation).

138. *Id.* at **3-4.

139. *Id.* at *4 (stating that "Byington can identify no injury he experienced at Dr. Mize's hands, even if he were misled as to the doctor's experience").

would not have been lost.[140] However, in cases involving transactional work, and perhaps in other contexts, it may suffice to establish that the attorney's default caused the loss of an advantageous opportunity.[141] There are cases that suggest that demonstrating that the defendant's error made everything more difficult or expensive will be enough to prove that a breach of duty caused damage.[142]

4. Nonclients

Fraud is readily actionable by third parties, even in cases where the defendant is an attorney. Thus,

> If an attorney commits actual fraud in his dealings with a third party, the fact he did so in the capacity of attorney for a client does not relieve him of liability.... While an attorney's professional duty of care extends only to his own client and intended beneficiaries of his legal work, the limitations on liability for negligence do not apply to liability for fraud.[143]

Consequently, false statements about credentials or experience made to a prospective client who detrimentally relies thereon are likely to support a cause of action for fraud, if the other requirements of the action are met. As discussed below,[144] however, the same is not true in an action for negligent misrepresentation. In actions based on negligence, rather than fraud, the scope of liability is more tightly limited because the defendant has acted with less culpability.

5. Privacy Interests of the Attorney

In some contexts, the duty that an attorney has to disclose to a client facts relating to credentials or experience may be offset by the attorney's privacy

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140. *Cf.* Orrick Herrington & Sutcliff, L.L.P. v. Super. Ct., 132 Cal. Rptr. 2d 658, 659 (Cal. Ct. App. 2003) (stating that if legal malpractice claim asserts negligent prosecution or defense, a case-within-a-case method should be employed).

141. *Cf.* Viner v. Sweet, 70 P.3d 1046, 1050 (Cal. 2003) (stating that, in a case involving legal work relating to the sale of a business, plaintiffs were required to show that but for the defendant's negligence "(1) they would have had a more advantageous agreement (the 'better deal' scenario), or (2) they would not have entered into the transaction . . . and therefore would have been better off (the 'no deal' scenario)").

142. *See* Vahila v. Hall, 674 N.E.2d 1164, 1169 (Ohio 1997) (noting that a "strict 'but for' test" for causation tends to overprotect errant attorneys and require the introduction of "remote and speculative" evidence).

143. Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 32 (Cal. Ct. App. 2004) (internal quotations and citations omitted).

144. *See infra* Part III.A.

interests. Consider, for example, the case of an attorney who earned low grades in the relevant law school course. Federal law has set up an elaborate array of statutory and regulatory provisions preventing unauthorized disclosure of academic information. The Family Educational Rights and Privacy Act of 1974 (FERPA)[145] broadly bans educational institutions from releasing educational records of present or former students.[146] While the lawyer to whom the records relate may consent to release of that information,[147] courts should not lightly force attorneys to surrender their educational privacy rights.

Similarly, many students receive testing accommodations under the Americans with Disabilities Act (ADA),[148] which requires educational institutions to protect the confidentiality of related information.[149] Attorneys who receive accommodations in law school may not need to disclose that information to clients,[150] although the issue has not yet been resolved by the judiciary. Courts should tread carefully in these and related areas, where recognition of broad common law obligations might threaten to disrupt or defeat federal legislative policy.

III. Negligence

Although fraud provides a framework for balancing the competing interests of attorneys and clients in cases involving alleged misrepresentation of credentials or experience, fraud is not the only viable avenue for relief of aggrieved clients. Clients who are harmed by an attorney's misrepresentation of credentials or experience may also seek redress under the law of negligence by suing for negligent misrepresentation or negligent failure to obtain informed consent.

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145. 20 U.S.C. § 1232g (2000).

146. *See generally* Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. 469 (2001).

147. *See* Margaret L. O'Donnell, *FERPA: Only One Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679, 686 (2003) (stating that, under FERPA, "[a]ll education records are confidential and cannot be disclosed unless the student consents or the disclosure fits one of the exceptions").

148. *See generally* Donald H. Stone, *What Law Schools Are Doing to Accommodate Students with Learning Disabilities*, 42 S. TEX. L. REV. 19 (2000).

149. Under the ADA, educational institutions are required to provide an array of special accommodations for students with learning disabilities, including, for example, extra time to complete exams. *See id.* at 26.

150. *Compare* Frances A. McMorris, *Aspiring Lawyer with Dyslexia Gets Test Access*, WALL ST. J., July 18, 1997, at B1 (opining that "lawyers aren't required to disclose their disabilities to clients"), *with* Scott Lemond & David Mizgala, *Identifying and Accommodating the Learning Disabled Lawyer*, 42 S. TEX. L. REV. 69, 90 (2000) (stating that "[i]llness or disability . . . cannot serve as a shield to liability for failure to comport with rules of professional conduct").

A claim for negligence is often preferable to one based on intentional wrongdoing[151] because it is usually easier to impose vicarious liability,[152] or reach insurance proceeds,[153] when the action is for lack of care, as opposed to intentional harm. If the defendant's lack of care is egregious and constitutes gross negligence or recklessness, rather than ordinary negligence, the plaintiff may also recover the type of exemplary damages that are available in an action for fraud.[154] Suing for negligence, rather than fraud, also avoids the stringent requirements for pleading and proof that are often applicable to fraud actions.[155] Thus, there are several good reasons for plaintiffs to frame misrepresentations by attorneys about credentials or experience as negligence claims, rather than as actions for fraud.

Disadvantages, however, do exist for negligence actions. One possible disadvantage of suing for negligence rather than fraud concerns defenses. Contributory negligence is a defense in any action based on lack of care.

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151. *See, e.g.*, Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 908-09 (2004) (arguing that "the transferred-intent doctrine serves little useful purpose with respect to third parties [who suffer accidental injury], for actions based on lack of care typically provide plaintiffs with a better route to recovery").

152. *Cf.* Medlin v. Bass, 398 S.E.2d 460, 464 (N.C. 1990) (stating in a sexual assault action that "intentional tortious acts are rarely considered to be within the scope of an employee's employment") (quoting Brown v. Burlington Indus., Inc., 378 S.E.2d 232, 235 (N.C. Ct. App. 1989)).

153. *See* 7A JOHN A. APPLEMAN ET AL., INSURANCE LAW AND PRACTICE § 4501.09, at 267 (Supp. 2003) (indicating that "[i]ntentional injuries, generally, are not covered"). Proof of negligence may also avoid an exclusion from coverage for fraudulent or dishonest conduct. *See* 11 LEE R. RUSS, COUCH ON INSURANCE § 161.19 (3d ed. 2004) [hereinafter COUCH ON INSURANCE] (For negligence to constitute fraud, "there must be more than mere negligence, done with an honest intent. Stated otherwise, there must be something more than negligence, mistake, carelessness, errors in judgment, inattention to business, or incompetence in order to satisfy the definition of dishonesty . . . .").

154. For example, in Texas, gross negligence will support an award of punitive damages. *See* TEX. CIV. PRAC. & REM. CODE § 41.003 (Vernon 1997 & Supp. 2004) (stating that "exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence").

155. FED. R. CIV. P. 9(b) (requiring a complaint alleging fraud to state "the circumstances constituting fraud . . . with particularity"). Many states have a similar requirement. *See, e.g.*, Hills Transp. Co. v. S.W. Forest, 72 Cal. Rptr. 441, 444 (Cal. Ct. App. 1968) ("It is well established that the pleading of fraud and deceit must be specific . . . ."). Most states also provide that the burden of persuasion with respect to fraud is higher than the ordinary "preponderance of the evidence" standard. *See* Kilduff v. Adams, Inc., 593 A.2d 478, 487 (Conn. 1991) (indicating that "numerous courts have stated that a heightened burden of proof applies to all the elements of the cause of action for fraud, including damages," but holding that a "clear and satisfactory evidence" standard applied to all elements of fraud, except damages, which required only a preponderance of the evidence).

Consequently, if the plaintiff's reliance on a negligent misrepresentation was unreasonable, such carelessness on the part of the plaintiff, in most states,[156] will reduce or preclude recovery based on applicable principles of comparative negligence[157] or comparative fault.[158] In contrast, negligence on the part of the plaintiff is almost never a defense to intentional torts, and therefore cannot be raised in most fraud actions.[159]

A. Negligent Misrepresentation

There is authority from the medical field that misrepresentation of experience is actionable as a form of negligent misrepresentation.[160] The central landmark

156. The District of Columbia and four states have not adopted comparative negligence or comparative fault and still retain strict common law contributory negligence, which makes unreasonable conduct by the plaintiff a total bar to any action based on negligence. *See* Bergob v. Scrushy, 855 So. 2d 523 (Ala. Civ. App. 2002) (stating Alabama law); Wingfield v. Peoples Drug Store, Inc., 379 A.2d 685 (D.C. 1977) (stating District of Columbia law); Pippin v. Potomac Elec. Power Co., 132 F. Supp. 2d 379 (D. Md. 2001) (stating Maryland law); Yancey v. Lea, 532 S.E.2d 560 (N.C. Ct. App. 2000) (stating North Carolina law); Litchford v. Hancock, 352 S.E.2d 335 (Va. 1987) (stating Virginia law).

157. There are two basic regimes for comparative negligence, "pure" and "modified." Under pure comparative negligence, a contributorily negligent plaintiff is not barred from recovery, but damages are reduced in proportion to the plaintiff's lack of care. Under modified comparative negligence, there is typically a 50% threshold. If the plaintiff's contributory negligence exceeds (or, in some jurisdictions, equals) 50% of the total negligence, there can be no recovery. If the plaintiff's contributory negligence is below 50%, the plaintiff can recover proportionally reduced damages. *See generally* DOBBS, *supra* note 126, § 201.

158. Under comparative fault, contributory negligence may be invoked to offset liability for recklessness or strict liability, as well as liability for negligence, on either a pure or a modified basis. *See, e.g.*, UNIF. COMPARATIVE FAULT ACT §§ 1-2 (2003).

159. It is arguable that negligence on the part of the plaintiff cannot even be used as a defense in a fraud action based on recklessness, rather than intentionally tortious conduct:

> It is usually assumed in discussions of deterrence as a goal of tort law that what is to be deterred is specific misbehavior like driving too fast or lying to potential buyers. In fraud cases, however, it may be useful to regard the appropriate deterrence as being deterrence of making a living by looking for gullible people with whom to deal. There is no social utility in seeking out potential customers who are too ignorant or foolish to realize that they are being cheated. Therefore, "unreasonable" behavior by the victim of a fraud should not be, and is not, a defense; the point of this body of law is precisely to deter the defendant from seeking out that kind of buyer. In ordinary negligence cases, the injured person's negligence may well be a defense (at least in part) because carelessness on the part of victims, as well as injurers, should be deterred, and because it becomes harder to say that the injurer was negligent if the victim messed up badly. But in deceit cases, gullibility of the injured person is more like an element of the tort than a defense.

VINCENT R. JOHNSON & ALAN GUNN, TEACHING TORTS 295-96 (2d ed. 1999).

160. *See, e.g.*, Bloskas v. Murray, 646 P.2d 907 (Colo. 1982). In *Bloskas*, the court extended

in the law of negligent misrepresentation is Section 552 of the *Restatement (Second) of Torts*. Section 552 provides:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[161]

Under this section or similar rules of law, attorneys have been held liable for making negligent misstatements that resulted in economic harm to clients and third parties.[162] The utterance of a statement may be negligent, even if the speaker has an honest belief in its truth, because of lack of reasonable care in verifying the facts, or lack of ordinary skill or competence typical of the particular calling.[163]

There is an important question, not definitively resolved, about whether silence can form the basis for a negligent-misrepresentation action or whether there must be some type of affirmative misstatement. Suppose, for example, that an attorney negligently fails to disclose adverse material information about credentials or experience, which other principles of law, such as the rules about facts basic to the transaction[164] or facts not reasonably discoverable,[165] create a duty to reveal. Can the attorney be sued for negligent misrepresentation? Or are

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the doctrine of negligent misrepresentation to representations made in the course of the doctor-patient relationship because it found "no reason to deny relief when a physician negligently conveys false information to the patient, and the patient relies upon the information to his physical harm." *Id.* at 914-15. Interestingly, the action in *Bloskas* may have properly been one for deceit, rather than negligent misrepresentation. The court noted that the doctor "told Mr. Bloskas that he, as a member of his medical group, had participated in ankle replacement surgery when in fact he had never previously performed such an operation." *Id.* at 915. Presumably, the doctor knew whether he did, or did not, participate in such an operation. The plaintiff may have been attempting to underplead the case as negligent misrepresentation rather than fraud to reach insurance proceeds. *See* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721 (1997) (discussing attempts to establish negligence in cases involving intentional harm).

161. RESTATEMENT OF TORTS, *supra* note 1, § 552.

162. *See generally* Nanneska N. Hazel, *Depending Upon the Care of Strangers: Professionals' Duty to Third Parties for Negligent Misrepresentation*, 33 TEX. TECH. L. REV. 1073 (2002).

163. *See* Martin v. Ohio State Univ. Found., 742 N.E.2d 1198, 1209 (Ohio Ct. App. 2000).

164. *See supra* Part II.A.1.

165. *See supra* Part II.A.2.

the rules of negligent misrepresentation applicable only if there has been some type of false or misleading statement, as opposed to mere silence?

When the *Restatement* speaks of liability for negligently "supply[ing] false information,"[166] it seems to suggest that there must be an affirmative misstatement.[167] Certain cases can be read to support this view.[168] Other cases, however, have expressly held that for purposes of liability for negligent misrepresentation, there is no difference between misleading silence and a false or misleading statement.[169] Depending upon the view applicable in the relevant jurisdiction, a large range of cases — those involving nondisclosure of material information about credentials and experience — may be actionable under this theory of recovery.[170]

The scope of liability for economic harm resulting from negligent misrepresentation[171] is more limited than the scope of liability for fraud.[172] In

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166. RESTATEMENT OF TORTS, *supra* note 1, § 552(1).

167. The text of the *Restatement* is unclear. Section 551 says:

> One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose . . . .

See id. § 551. The use of the word "knows" (rather than, for example, the phrase "should know") arguably suggests that the stated rule applies only to cases involving scienter, not negligent misrepresentation. But section 551 appears before section 552 on negligent misrepresentation, so perhaps in endorsing section 551, the American Law Institute was not addressing whether the same rule applies in cases of negligent misrepresentation.

168. *See, e.g.*, *Martin*, 742 N.E.2d at 1209 ("A negligent misrepresentation claim does not lie for omissions: there must be an affirmative false statement."); McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999).

169. *See, e.g.*, *In re* Agrobiotech, Inc., 291 F. Supp. 2d 1186, 1192 (D. Nev. 2003) ("Pursuant to § 551, silence about material facts basic to the transaction, when combined with a duty to speak, is the functional equivalent of a misrepresentation or 'supplying false information' under Restatement § 552."); *see also* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 906 (Cal. Ct. App. 1976) (holding that attorneys could be held liable for negligent misrepresentation based on failure to disclose doubts about a partnership's status as a general partnership).

170. *Cf.* Armstrong v. Hrabal, 87 P.3d 1226, 1244 (Wyo. 2004) (holding that plaintiff could not amend the complaint to add a "negligent misrepresentation" claim against an emergency room physician, based on the physician's alleged failure to disclose a prior lawsuit against her, because plaintiff had not "distinguished between the torts of negligent misrepresentation and nondisclosure" and had "not adequately advocated for the adoption of the latter tort").

171. *See* Martha H. West Trust v. Mkt. Value of Atlanta, Inc., 584 S.E.2d 688, 691 (Ga. Ct. App. 2003) (noting that absent privity, physical harm, willfulness, or property damage, liability will not extend to all foreseeable victims).

172. *See* RESTATEMENT OF TORTS, *supra* note 1, § 552 cmt. a (stating that liability for negligent misrepresentation is narrower than that for fraudulent misrepresentation). "When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker

some cases, the plaintiff may be unable to show a sufficiently close connection to the attorney to state a cause of action. A client or potential client who directly receives negligently false information from a lawyer about his credentials or experience stands in a better position to sue than one who receives that information indirectly. Yet there are many persons within the latter class. A lawyer's statements about credentials or experience often circulate through the community or are transmitted indirectly to potential plaintiffs by intermediaries. If the lawyer who has allegedly engaged in negligent misrepresentation has not dealt directly with the party who relies on the false information, there is a difficult question regarding whether the plaintiff is entitled to recover damages. If precedent from the accounting cases[173] is followed in suits against lawyers, there will likely be three different views. First, courts using the New York view will require privity or a relationship akin to privity.[174] Under this view, unless the negligently erroneous information about credentials or experience was

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of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences." *Id.*

173. The leading opinion on whether accountants are liable to third parties for negligent misrepresentation is still *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931), in which the court refused to hold accountants liable "in an indeterminate amount for an indeterminate time to an indeterminate class." More recently, the California Supreme Court summarized the complex state of the law as follows:

> A substantial number of jurisdictions follow the lead of Chief Judge Cardozo's 1931 opinion for the New York Court of Appeals in *Ultramares* by denying recovery to third parties for auditor negligence in the absence of a third party relationship to the auditor that is "akin to privity." In contrast, a handful of jurisdictions, spurred by law review commentary, have recently allowed recovery based on auditor negligence to third parties whose reliance on the audit report was "foreseeable."
>
> Most jurisdictions . . . have steered a middle course based in varying degrees on *Restatement Second of Torts* section 552, which generally imposes liability on suppliers of commercial information to third persons who are intended beneficiaries of the information.

Bily v. Arthur Young & Co., 834 P.2d 745, 752 (Cal. 1992) (internal citations omitted) (overruling lower court decisions which had followed a foreseeability approach and endorsing the *Restatement* position).

174. *See* Goldfine v. DeEsso, 766 N.Y.S.2d 215, 216 (N.Y. App. Div. 2003) (holding that a third-party negligent misrepresentation action against an attorney failed because the evidence did not prove actual privity or a relationship that approached privity); Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 590 N.Y.S.2d 831, 833 (N.Y. App. Div. 1992) (relying on precedent from cases relating to accountants in holding that the relationship between a lender and a borrower's law firm was sufficiently close to support liability for negligent misrepresentation); Hedges v. Durrance, 834 A.2d 1, 5 (Vt. 2003) (stating that "in order to sustain a cause of action against an attorney for negligent misrepresentation, a third party must demonstrate a relationship so close as to approach that of privity") (internal quotations omitted).

provided directly to the plaintiff by the defendant,[175] or was transmitted to the plaintiff through a third party under circumstances where the plaintiff was the "end and aim of the transaction,"[176] the plaintiff's suit will likely fail. Second, some courts will embrace a foreseeability view. Under this approach, a plaintiff who relies on negligently false information about a lawyer's credentials or experience will only be permitted to recover if the plaintiff's reliance was foreseeable to the defendant. Finally, some courts will embrace the *Restatement* position, which requires more than mere foreseeability but less than privity or its functional equivalent.[177] Under the *Restatement* approach, a plaintiff who relies upon negligently false information about a lawyer's credentials or experience may recover for resulting economic harm only if the plaintiff was one of a limited group of persons for whose benefit the information was supplied. Case law is already beginning to reflect these and other variations in the rules governing attorneys' liability for negligent misrepresentation to persons who do not deal with them directly.[178]

Actions for negligent misrepresentation share some of the same requirements that are applicable in actions for fraud. Among other things, the plaintiff must establish reliance on the misrepresentation[179] and that the reliance caused

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175. *See* Credit Alliance Corp. v. Arthur Andersen & Co., 493 N.Y.S.2d 435, 445 (N.Y. 1985) (finding that direct communications between a lender and a borrower's accountant sufficiently approached privity to support an action for negligent misrepresentation).

176. *Cf.* Glanzer v. Shepard, 135 N.E. 275, 275 (N.Y. 1922) (Cardozo, J.) (holding that a weigher hired by the seller of beans was liable to the buyer for negligence because the buyer's reliance on the statement of weight was the "end and aim of the transaction"); La Salle Nat'l Bank v. Ernst & Young L.L.P., 729 N.Y.S.2d 671, 675 (N.Y. App. Div. 2001) (finding that a returned telephone call was not sufficient linkage to support an action for negligent misrepresentation).

177. According to the *Restatement*, liability for negligent misrepresentation is ordinarily limited to losses suffered:

> (a) by the person or one of a limited group of persons for whose benefit and guidance . . . [the maker of the statement] intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

RESTATEMENT OF TORTS, *supra* note 1, § 552(2).

178. *See* B.L.M. v. Sabo & Deitsch, 64 Cal. Rptr. 2d 335, 343 (Cal. Ct. App. 1997) (holding that a developer failed to sufficiently allege that a law firm, which acted as special counsel for a city and as bond counsel for a construction project, intended to induce the developer's reliance on its representations); Lord v. Parisi, 19 P.3d 358, 363 (Or. Ct. App. 2001) (stating that a nonclient may recover on a negligent misrepresentation claim against an attorney if there is proof of a "special relationship, in which the party sought to be held liable had some obligation to pursue the interests of the other party") (internal quotations omitted).

179. *See* Mehaffy, Rider, Windholz & Wilson v. Cent. Bank of Denver, N.A., 892 P.2d 230,

damage. One should expect that the scope of liability for negligence will not extend as far as in an action for fraud, for it is less culpable. Because that is true, imposing broad liability risks running afoul of the proportionality principle, which holds that liability should be proportional to fault. This public policy principle may affect the course of litigation in many ways. In particular, the proportionality principle may indirectly influence judicial determinations regarding what evidence on damages is admissible, how the jury instructions should be stated, and whether a jury verdict is subject to challenge on the ground that it is excessive.

B. Lack of Informed Consent

Legal malpractice policies often exclude coverage for harm resulting from dishonest or fraudulent conduct.[180] Consequently, there may be value to characterizing misleading assertions or nondisclosures relating to experience or credentials as something other than misrepresentation. An action for negligent failure to obtain informed consent offers one option for framing a case in a way that minimizes the issue of dishonesty and therefore the risk of triggering an exclusion from coverage.

In the medical context, a doctor has a duty to disclose the material risks of, and the alternatives to, a proposed course of treatment.[181] Failure to obtain informed consent is a form of negligence, even if the doctor otherwise acts carefully in rendering professional services. Recent case law from the medical field provides useful guidance about how misrepresentation of information regarding credentials or experience might be treated as a violation of the professional duty to secure informed consent from a patient or a client.

In *Howard v. University of Medicine & Dentistry of New Jersey*,[182] the Supreme Court of New Jersey considered "what causes of action will lie when a plaintiff contends that a physician misrepresented his credentials and

238 (Colo. 1995) (stating, in an action by a bank against a town's attorneys, that "[r]eliance is a necessary element of a claim for negligent misrepresentation").

180. *See* 9 COUCH ON INSURANCE, *supra* note 153, § 131:21 (stating that "[a]ttorneys professional liability insurance policies frequently exclude from coverage any dishonest, fraudulent, criminal or malicious act or omission") (internal quotations omitted).

181. *See generally* Laurel R. Hanson, Note, *Informed Consent and the Scope of a Physician's Duty of Disclosure*, 77 N.D. L. REV. 71, 71 (2001) (exploring the nature of "what a physician must tell a patient in order to achieve full disclosure"); *see also* DOBBS, *supra* note 126, at 653 (stating that "patients are entitled to information about the risks of . . . the procedure, its necessity, and alternative procedures that might be preferable"); *cf.* Grant H. Morris, *Dissing Disclosure: Just What the Doctor Ordered*, 44 ARIZ. L. REV. 313, 315 (2002) (stating that while "[i]n the latter half of the twentieth century, the legal requirement of informed consent became well-established in all fifty states," as a practical reality, "it did not").

182. 800 A.2d 73 (N.J. 2002).

experience at the time he obtained the plaintiff's consent to surgery."[183] In *Howard*, the plaintiff husband and wife alleged that the defendant neurosurgeon had falsely represented that he was board certified and had "performed approximately sixty corpectomies in each of the eleven years he had been performing such surgical procedures."[184] The wife "was opposed to the surgery and it was only after [the doctor's] specific claims of skill and experience that she and her husband decided to go ahead with the procedure."[185]

The court held that misrepresentations about a physician's credentials and experience supported a claim for lack of informed consent, but not "a separate and distinct claim based on fraud."[186] The court failed to explain why a claim for fraud was unavailable,[187] but concluded that it was "not convinced that . . . a novel fraud or deceit-based cause of action" was necessary where such claim "would admit of the possibility of punitive damages, and . . . circumvent the requirements for proof of both causation and damages imposed in a traditional informed consent setting."[188] The court was "especially reluctant" to extend the law because "plaintiff's damages from this alleged 'fraud' [arose] exclusively from the doctor-patient relationship . . . ."[189]

The alleged fault of the defendant in *Howard* was outright lying, not simply nondisclosure. Why the court was concerned that punitive damages would be imposed if outright lying was proved is unclear. In addition, it is far from apparent why an action for fraud "would circumvent the requirements for proof of both causation and damages imposed in a traditional informed consent setting."[190] Causation and damages *are* elements of an action for fraud.[191] The

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183. *Id.* at 75.

184. *Id.* at 76.

185. *Id.*

186. *Id.* at 77.

187. The court merely noted:

> Few jurisdictions have confronted the question of what cause of action should lie when a doctor allegedly misrepresents his credentials or experience. . . . Although some suggest that a claim based in fraud may be appropriate if a doctor actively misrepresents his or her background or credentials, we are aware of no court that has so held.

Id. at 81-82.

188. *Id.* at 82.

189. *Id.*

190. *See id.*

191. *See, e.g.*, Dresser-Rand Co. v. Virtual Automation Inc., 361 F.3d 831, 843 (5th Cir. 2004) ("Among the essential elements of fraud is a showing of injury suffered because of the fraud."); Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 31 (Cal. Ct. App. 2004) (defining the elements of fraud as "(1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damage (causation)"); Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 540 (Pa. Super. Ct. 2003) (stating that causation of damage is an

court's reluctance to entertain a fraud claim arising exclusively from a doctor-patient relationship is puzzling.[192] The case involved alleged *lying* in the course of a *fiduciary* relationship. The one case cited by the court sheds little light on its reluctance to permit a claim for fraud.[193] One would have expected the court to announce that deceit actively practiced on a patient by a physician is intolerable, and that outright lying about credentials or experience is actionable fraud. Perhaps the court was only trying to ensure that a judgment in favor of the plaintiff would be covered by the defendant's malpractice insurance, which would cover negligence but not fraudulent conduct.

On the subject of informed consent, the *Howard* court held that "significant misrepresentations concerning a physician's qualifications can affect the validity of consent obtained."[194] The court further stated that "a serious misrepresentation concerning the quality or extent of a physician's professional experience . . . can be material to the grant of intelligent and informed consent to the procedure."[195]

The plaintiff husband in *Howard* alleged that "defendant's misrepresentations induced [him] to consent to a surgical procedure . . . that he would not have undergone had he known the truth about defendant's qualifications."[196] Ultimately, the court held that plaintiff's claim was founded on "lack of informed consent."[197]

Under informed-consent law, a factor that increases the risk of harm needs to be disclosed only if it is material.[198] The *Howard* court concluded that "if an objectively reasonable person could find that physician experience was material in determining the medical risk of the corpectomy procedure to which plaintiff consented, . . . and if a reasonably prudent person in plaintiff's position . . .

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essential element in a fraud case).

192. *See Howard*, 800 A.2d at 82.

193. The *Howard* court cited *Spinosa v. Weinstein*, 571 N.Y.S.2d 747, 753 (N.Y. App. Div. 1991), for the proposition that

> concealment or failure to disclose [a] doctor's own malpractice does not give rise to claim of fraud or deceit independent of medical malpractice, and . . . [the] intentional tort of fraud [is] actionable only when the alleged fraud occurs separately from and subsequent to the malpractice . . . and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the malpractice.

Howard, 800 A.2d at 82 (internal quotations and alterations omitted).

194. *Id.* at 83.

195. *Id.*

196. *Id.* at 84.

197. *Id.*

198. *See, e.g.*, Scott v. Bradford, 606 P.2d 554, 557-58 (Okla. 1979).

informed of the [doctor's] misrepresentations about his experience would not have consented, then a claim . . . may be maintained."[199]

The court opined that it would be inherently difficult for plaintiffs to meet the materiality standard[200] because that would require proof that the defendant's true level of experience increased the risk of injury from the procedures the defendant performed.[201] If what the *Howard* court means is that the plaintiff must quantify with particularity the degree, perhaps in percentage format, to which the lack of credentials or experience increased the risk of harm, the standard is formidable indeed. That type of approach in medical malpractice cases involving the loss-of-a-chance doctrine[202] has often denied recovery to plaintiffs.[203] In *Howard*, the court clearly intended to set a high bar for recovery based on misrepresentation of credentials or experience, for the court explained the "stringent test" as imposing "a significant gatekeeper function on the trial court to prevent insubstantial claims concerning alleged misrepresentations about a physician's experience from proceeding to a jury."[204] The court created a two-prong test for establishing proximate cause when doctors misrepresent their experience: (1) "whether the more limited experience or credentials

199. *Howard*, 800 A.2d at 84. New Jersey uses an objective test for proving that nondisclosure of a material risk caused harm in informed-consent cases. Most states take a similar approach. *See, e.g.*, Ashe v. Radiation Oncology Assocs., 9 S.W.3d 119 (Tenn. 2000) (endorsing the majority objective standard). *But see Scott*, 606 P.2d at 559 (stating that the majority rule "severely limits the protection granted an injured patient").

200. *Howard*, 800 A.2d at 84 (stating that "most informed consent issues are unlikely to implicate a setting in which a physician's experience or credentials have been demonstrated to be a material element affecting the risk of undertaking a specific procedure").

201. *Id.* at 84-85 (establishing a demanding standard for proving a substantially increased risk). According to the court, a patient must "prove that the actual level of experience possessed by [the doctor] had a direct and demonstrable relationship to the harm" and that nondisclosure of the doctor's "true level of qualifications and experience increased [the patient's] risk . . . ." *Id.*

202. Some courts hold that the loss of a chance to cure a disease or mitigate some other medical problem qualifies as a type of harm for which recovery is available. Tortious conduct that causes an increased risk of harm, such as a greater risk of developing cancer, is also actionable. *See* Alberts v. Schultz, 975 P.2d 1279, 1283 (N.M. 1999) (stating that "under the lost-chance theory, the patient does not allege that the malpractice caused his or her entire injury" but rather that "the health care provider's negligence reduced the chance of avoiding the injury actually sustained").

203. *See, e.g.*, Waffen v. U.S. Dep't of Health & Human Servs., 799 F.2d 911, 923 (4th Cir. 1986) (holding that an admission of "some undefinable chance" that the plaintiff might have survived had she been promptly treated was not a sufficient predicate for an award of damages); *Alberts*, 975 P.2d at 1288 (recognizing the loss-of-a-chance doctrine but denying recovery because the plaintiff failed to prove that timely medical intervention would have prevented his deterioration).

204. *Howard*, 800 A.2d at 85.

possessed by [the doctor] could have substantially increased [the patient's] risk" and (2) "whether that substantially increased risk would cause a reasonably prudent person not to consent to undergo the procedure."[205]

If the plaintiff is able to surmount the high bar for proving proximate causation of harm, under *Howard*, recovery is permitted even if the physician otherwise exercised care in performing professional services.[206] The misrepresentation of credentials or experience is all that is needed to establish that a duty was breached.

Howard offers guidance to courts dealing with the issue of misrepresentation of credentials or experience in lawyer-client relationships. Although the informed-consent doctrine has yet to find equally clear recognition in the legal malpractice field as in medical malpractice, "there is good authority that the same principles apply as readily in law as in medicine."[207] However, it is important to consider carefully what *Howard* did not decide, what it decided

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205. *Id.* The court further noted:

> The court's gatekeeper function in respect of the first question will require a determination that a genuine issue of material fact exists requiring resolution by the factfinder in order to proceed to the second question. . . . [T]he trial court must conclude that there is a genuine issue of material fact concerning both questions in order to allow the claim to proceed to trial.

Id.

206. *Id.*

207. Johnson, *Candor*, *supra* note 4, at 749; *see also id.* at 749 n.37 (citing, inter alia, Sierra Fria Corp. v. Donald J. Evans, P.C., 127 F.3d 175, 179-80 (1st Cir. 1997)). In *Sierra Fria*, the court wrote:

> [W]hen a client seeks advice from an attorney, the attorney owes the client a duty of full and fair disclosure of facts material to the client's interests. This means that the attorney must advise the client of any significant legal risks involved in a contemplated transaction, and must do so in terms sufficiently plain to permit the client to assess both the risks and their potential impact on his situation.

Sierra Fria, 127 F.3d at 180 (internal quotations and citations omitted). The *Sierra Fria* court found the defendant law firm had repeatedly warned its client of the dangers of consummating a property purchase without a survey, and therefore the firm was not liable to the client. *Id.* at 184. "Some scholars call for an informed consent doctrine in legal malpractice, such as has become a standard in medical malpractice." Lerman, *supra* note 2, at 670. Professor Lerman further states that the informed consent standard for attorneys should be broad, "based on what the client might reasonably want to know [which] would encompass information about issues such as expertise, error, and billing that appear to be common subjects of deception." *Id.* at 685 n.95; *see also id.* at 669 n.39 (citing Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987)); *id.* at 670 n.41 (citing Roger W. Andersen, *Informed Decisionmaking in an Office Practice*, 28 B.C.L. REV. 225 (1987), Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980), and Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 41 (1979)); *id.* at 701 n.168 (citing DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 154-55 (1974)).

incorrectly, and what advantages an informed-consent theory has over alternative causes of action. First, *Howard* did not address whether there is a professional duty to disclose information about credentials or experience.[208] Rather, the court limited itself to an analysis of theories of recovery applicable in a case where a misrepresentation allegedly has been made by an affirmative misstatement.[209] There is, however, no reason why informed consent principles should not be applied to cases involving nondisclosure rather than affirmative misrepresentation. Doctors have been held liable for not disclosing, rather than actively misrepresenting, material facts,[210] and courts have said that the same principles apply to lawyers.[211]

Still, *Howard's* general endorsement of an informed-consent approach to dealing with issues relating to credentials and experience is sound. "Experience and success rate of the physician or surgeon are relevant, not to the decision to accept treatment, but to the decision to accept it at the hands of the defendant. . . ."[212] Recent decisions by courts of Wisconsin,[213] Maryland,[214] and Delaware[215] have held that there is a duty on doctors, enforceable in an

208. *Howard*, 800 A.2d at 82 (stating that "case law never has held that a doctor has a duty to detail his background and experience as part of the required informed consent disclosure; nor are we called on to decide that question here").

209. *Id.* at 83.

210. *See, e.g.*, Haley v. United States, 739 F.2d 1502 (10th Cir. 1984) (imposing liability because physicians did not adequately inform a patient about the potential for wound infection).

211. *See Sierra Fria Corp.*, 127 F.3d at 179-80.

212. DOBBS, *supra* note 126, at 660-61; *see also* Hales v. Pittman, 576 P.2d 493, 500 (Ariz. 1978) (opining that, when consenting to medical treatment, "a person needs information not only concerning the statistical probabilities of various adverse results . . . but also . . . information concerning the treating physician's experience with the particular procedure").

213. *See* Johnson by Adler v. Kokemoor, 545 N.W.2d 495, 507 (Wis. 1996) (holding that, when different physicians have substantially different success rates with the same procedure and a reasonable person in the patient's position would consider such information material, such statistical evidence may be admitted in an informed-consent case in which the plaintiff contends that the defendant surgeon failed to disclose his own inexperience); *see also* Richard A. Heinemann, *Pushing the Limits of Informed Consent:* Johnson v. Kokemoor *and Physician-Specific Disclosure*, 1997 WIS. L. REV. 1079, 1093-94 (stating that "prior to *Johnson*, disclosure of a physician's comparative risk data had been required in only one jurisdiction," namely Arizona); Jennifer Wolfberg, *Two Kinds of Statistics, The Kind You Look Up and the Kind You Make Up: A Critical Analysis of Comparative Provider Statistics and the Doctrine of Informed Consent*, 29 PEPP. L. REV. 585, 585 (2002) (opining that "it is just a matter of time before the rest of the country eventually follows suit with Wisconsin and broadens the doctrine of informed consent to include provisions of provider statistics").

214. *See* Dingle v. Belin, 749 A.2d 157, 165-66 (Md. 2000) (stating that, to obtain informed consent, it may be necessary to disclose precisely who will be conducting or superintending the procedure or therapy).

215. *See* Barriocanal v. Gibbs, 697 A.2d 1169 (Del. Super. Ct. 1997) (holding that a trial court improperly excluded expert testimony that a surgeon breached the standard of care for

informed-consent action, to disclose information about their past experience to patients.[216] There is, however, also authority to the contrary, and a number of courts have held that nondisclosure of information about medical credentials or experience will not support an action based on lack of informed consent.[217] If information about experience and success rate is material to selecting a doctor,[218] then it is also at least arguably relevant to selecting an attorney.

Second, *Howard's* conclusion that an action for fraud is not available against a professional for an outright lie relating to credentials or experience cannot be justified. A misstatement of fact, made with knowledge of falsity or reckless disregard for the truth, is actionable fraud. The rule is ubiquitously applicable to a broad range of contexts.[219] Surely, "[a] fraud claim against a lawyer is no different from a fraud claim against anyone else."[220] There is no good reason why a false statement of material fact about a doctor's or lawyer's credentials or past experience cannot support an action for fraud, provided that each of the requirements of the tort is met. More than a century ago, the Supreme Court of

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informed consent by failing to inform a patient of his lack of recent aneurysm surgery).

216. *See also* Hidding v. Williams, 578 So. 2d 1192, 1198 (La. Ct. App. 1991) (holding that a physician's failure to disclose his chronic alcohol abuse to a patient and his wife vitiated their consent to surgery).

217. *See, e.g.*, Abram by Abram v. Children's Hosp., 542 N.Y.S.2d 418, 418-19 (N.Y. App. Div. 1989) (holding that, under state statutes, a patient could not state a claim for lack of informed consent based on defendant's failure to disclose the providers' qualifications); Duttry v. Patterson, 771 A.2d 1255, 1259 (Pa. 2001) (holding that a surgeon's personal characteristics and experience are irrelevant to an informed consent claim); Kaskie v. Wright, 589 A.2d 213, 216 (Pa. Super. Ct. 1991) (holding that parents could not state a cause of action for lack of informed consent where they were not informed before their son's operation that the surgeon was an alcoholic and unlicensed to practice medicine); Whiteside v. Lukson, 947 P.2d 1263, 1265 (Wash. Ct. App. 1997) (holding that "a surgeon's lack of experience in performing a particular surgical procedure is not a material fact for purposes . . . of failure to secure an informed consent").

218. *See generally* Emmanuel O. Iheukwumere, *Doctor, Are You Experienced?: The Relevance of Disclosure of Physician Experience to a Valid Informed Consent*, 18 J. CONTEMP. HEALTH L. & POL'Y 373 (2002); Aaron D. Twerski & Neil B. Cohen, *The Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 NW. U. L. REV. 1 (1999).

Information relating to a professional's prior success rate has been recognized as material in other areas as well. *See, e.g.*, Commodity Futures Trading Comm'n v. Commonwealth Fin. Group, 874 F. Supp. 1345, 1353-54 (S.D. Fla. 1994) (holding that misrepresentations regarding the trading record and experience of a firm or broker are fraudulent because "past success and experience are material factors which a reasonable investor would consider when deciding to invest . . . through that firm or broker").

219. Findings of fraud range from prosaic assertions contained in the balance sheets, on one hand, *see* Ultramares Corp. v. Touche, Niven & Co., 174 N.E. 441 (N.Y. 1931), to dicey conversations used to induce another to have sex, on the other, *see* Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Cal. Ct. App. 1984).

220. Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 31 (Cal. Ct. App. 2004).

Michigan held that misrepresentation about the credentials of a physician's assistant was actionable deceit.[221]

Third, the informed-consent theory also offers considerable advantages for dealing with the difficult question of whether an attorney has a duty to disclose facts within the scope of a fiduciary relationship relating to credentials or experience.[222] The two-part test for proximate causation articulated in *Howard* offers a reasonable approach to dealing with issues of liability based on nondisclosure.[223] Absent proof that the nondisclosure by the lawyer involved facts basic to the transaction,[224] facts not reasonably discoverable,[225] or facts that were required to be disclosed because of the adversity of interests between the lawyer and client,[226] or by the demands of reasonable care,[227] the scope of liability should be tightly limited. Using the informed-consent rationale articulated in *Howard*, recovery would be permitted only where the defendant's deficiency in credentials or experience increased the risk of harm that the plaintiff suffered and a reasonable person would not have consented to the representation because of the increased risk.[228]

Finally, in the medical context, some courts have held the availability of an adequate informed-consent remedy obviates the need for an additional action based on breach of trust.[229] Presumably, attorney-defendants could argue that the same limitations should apply in the lawyer-client context if the judiciary

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221. *See* De May v. Roberts, 9 N.W. 146 (Mich. 1881). *De May* involved a physician who brought a young man without medical qualifications to the plaintiff's home to assist him in attending to a woman while she gave birth. *Id.* at 146. Because the assistant's lack of training was not disclosed, the court held that the woman's consent to his presence and touching did "not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character." *Id.* at 149. The court found that both the doctor and his alleged assistant were "guilty of deceit" for "obtaining admission at such a time and under such circumstances without fully disclosing [the assistant's] true character," and thus, the plaintiff could recover damages. *Id.*

222. *See supra* Part II.A.3.

223. *See* Howard v. Univ. of Med. & Dentistry of N.J., 800 A.2d 73 (N.J. 2002).

224. *See supra* Part II.A.1.

225. *See supra* Part II.A.2.

226. *See supra* note 59 and accompanying text.

227. *See supra* note 78 and accompanying text.

228. *See Howard*, 800 A.2d at 85.

229. *See* Hales v. Pittman, 576 P.2d 493, 497 (Ariz. 1978) ("We do not believe that the law in Arizona should be extended to recognize a new cause of action based on breach of trust when an adequate remedy for this case already exists."); *see also* Neade v. Portes, 739 N.E.2d 496, 503 (Ill. 2000) (holding that a cause of action for breach of fiduciary duty, based on a physician's failure to disclose his alleged financial interest in a medical incentive fund, could not be maintained because it was duplicative of a medical negligence claim).

recognizes an informed-consent action against lawyers who misrepresent credentials or experience.[230]

IV. Conclusion

Whether attorneys can be held liable for statements made, or matters not disclosed, regarding their credentials or experience are questions of ubiquitous importance. The questions implicate concerns that are continuously relevant in law practice and potentially bear upon every actual or potential lawyer-client relationship. How these queries are answered will set the standard for the conduct of attorneys in thousands of law offices. The answers will also influence what information is provided or denied to millions of consumers of legal services.

Basic principles of American tort law provide useful guidance in defining the disclosure obligations of attorneys. But like tort law itself, the answers are not simple. What an attorney may, must, or may not do is determined by a matrix of rules, which speak to an array of policy considerations that have shaped the law of fraud, fiduciary duty, negligent misrepresentation, and informed consent.

By way of summary, with respect to material matters relating to their credentials and experience: Attorneys *must not* engage in intentional, reckless, or negligent falsification of the facts.[231] Attorneys *must* disclose facts that are basic to the transaction,[232] not reasonably discoverable,[233] or directly relevant to the representation.[234] Attorneys *must* also disclose information that is necessary to prevent partial statements from being misleading[235] or that is otherwise called for by the duty of reasonable care[236] or by an actual adversity of interests between lawyer and client.[237] Moreover, attorneys *may* express favorable opinions about their qualifications, but in doing so, they must not misrepresent their state of mind or imply false facts.[238] Finally, attorneys *must* exercise

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230. *Cf.* Aiken v. Hancock, 115 S.W.3d 26, 28-29 (Tex. App. 2003) (holding that a former client's allegations that his attorney falsely represented that he was prepared to try the case and that an expert witness was prepared to testify were actionable under a theory of legal malpractice, but did not constitute a claim for breach of fiduciary duty).

231. *See supra* Part II.C (discussing outright lies) and Part III.A (discussing negligent misrepresentation).

232. *See supra* Part II.A.1.

233. *See supra* Part III.A.2.

234. *See supra* note 69 and accompanying text (discussing disclosures called for by new developments in representation).

235. *See supra* Part II.B.1 (discussing half-truths).

236. *See supra* note 78 and accompanying text.

237. *See supra* Part II.A.3 (discussing when the duty of "absolute and perfect candor" applies).

238. *See supra* Part II.B.2.

reasonable care to ensure that clients are able to give informed consent to decisions pertaining to the representation.[239] Complying with these rules, though difficult, is an essential step in assuring that clients are treated fairly by those who represent their interests.

239. *See supra* Part III.B.